FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 24 1944
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 189.

THE CONNECTICUT LIGHT AND POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF FOR PETITIONER.

CLAUDE R. BRANCH,
EDWARD M. DAY,
LAWRENCE A. HOWARD,
GAY H. BROWN,
Attorneys for Petitioner.

CHOATE, HALL & STEWART,
DAY, BERRY & HOWARD,
BROWN, RYAN & KENNY,
Of Counsel.

November, 1944.

L. H. LANE COMPANY, LAW PRINTERS, 221 HIGH ST., BOSTON, MASS.

INDEX.

	Page
Opinions	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
A. The Proceedings Below	3
B. General Character of Petitioner's Business	5
C. Petitioner's Supply for its Bristol, East Hampton and Torrington-Winsted Districts	6
D. Sales to the Borough of Groton and Resales to the Fishers Island Company	10
E. The Decision of the Court below	11
Specification of Errors	12
Summary of Argument	14
ARGUMENT	22
I. Petitioner is not a "public utility" under the provisions of Federal Power Act, and therefore is not currently subject to accounting regulation by the Federal Power Commission	22
A. The Federal Power Act was not intended to regulate a local distributing company like the Petitioner, which does not generate, transmit or sell any electric energy consumed outside of the state in which the company operates	23
1. The primary purpose of the Federal Power Act was to regulate interstate sales of electric energy and it was not intended to regulate local distributing companies	23
2. The legislative history of the Federal Power Act shows that it was not intended to regulate local distributing companies	27
B. Petitioner's facilities at Bristol are not facilities "for the transmission of electric energy in interstate commerce", within the purview of the Federal Power Act	32

Page

C. "Facilities used in local distribution" are exempt from the jurisdiction of the Commission, and all the facilities of Petitioner at Bristol are "facilities used in local distribution" 38

1. Facilities used in local distribution are exempt from the jurisdiction of the Commission 38

2. The exemption of "facilities used in local distribution" should be construed to exempt all facilities of a local distributing company beyond the point of delivery of the electric energy to it 44

3. All of the facilities of Petitioner at Bristol were beyond the point of delivery of electric energy to it at its distribution substation 47

D. The Court below erred in concluding that Petitioner's business was "essentially interstate" by reason of Petitioner's operations prior to the effective date of the Act 48

II. The Court below erred in refusing to weigh the testimony as to jurisdictional facts 50

III. Petitioner was not a "public utility" under the provisions of the Federal Power Act at any time since the effective date of the 1935 amendments to the Act 52

A. The facilities owned and operated by Petitioner for the supply of its East Hampton district, until June 30, 1939, and its Torrington-Winsted districts, until June 17, 1941, were not subject to the jurisdiction of the Federal Power Commission 52

B. The facilities owned and operated by Petitioner until February 28, 1941, for the transmission and sale of electric energy to the Borough of Groton, a municipal corporation, were not subject to the jurisdiction of the Federal Power Commission 53

1. Under the provisions of the Federal Power Act, the Federal Power Commission did not have jurisdiction over facilities of Petitioner used in connection with the sale of electric energy to a municipal corporation 54

Page

2. In any event the resale of energy by the Borough of Groton to Fishers Island should be disregarded under the doctrine of *de minimis non curat lex* .. 57

IV. Petitioner is not now a public utility within the meaning of the Federal Power Act, and no useful purpose would be served in requiring it to comply with orders applicable to public utilities even if it has been such a public utility at any time 59

V. Conclusion 61

Appendix A—Statutes Involved 63

Appendix B—The findings of the Commission to the effect that Petitioner purchased electric energy for the three districts connected with the C. P. lines which "regularly, frequently and for substantial periods of time included electric energy in substantial amounts transmitted from Massachusetts" cannot stand 68

MAP ..... *facing page* 79

INDEX OF CASES.

A

Atchison, Topeka & Santa Fe Railway Co. v. Railroad Comm., 283 U.S. 380, 391 31

B

Baltimore & Ohio R.R. Co. v. United States, 298 U.S. 349, 364 51

Banker Brothers Co. v. Pennsylvania, 222 U.S. 210 35

Bradley Lumber Co. v. National Labor Relations Board, 84 F. 2d. 97, 100 (C.C.A. 5th), cert. den. 299 U.S. 559 51

Broad River Power Co. v. Query, 288 U.S. 178 34

C

Crowell v. Benson, 285 U.S. 22 .....19, 51

Page

E

East Ohio Gas Co. v. Tax Commission, 283 U.S. 465, 471–2 ...34, 35

F

Federal Trade Commission v. Bunte Bros., Inc., 312 U.S. 349, 355 .....15, 31
Florida v. United States, 282 U.S. 194, 211–212 31

H

Hartford Electric Light Company, Docket No. IT-5560 26
Hartford Electric Light Company v. Federal Power Commission, 131 F. 2d 953; cert. den., 319 U.S. 741 25
Hartford Indemnity Co. v. Illinois, 298 U.S. 155 31
Houston, East & West Texas Railway Co. v. United States, 234 U.S. 342 30

I

Illinois Gas Co. v. Public Service Co., 314 U.S. 498 .....34, 36

J

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61 ....15, 18, 20, 23, 24, 25, 32, 33, 36, 48, 57, 58
Jersey Central Power & Light Co. v. Federal Power Commission, 129 F. 2d. 183, 194 39

L

Lone Star Gas Co. v. Texas, 304 U.S. 224 34

M

Missouri v. Kansas Gas Co., 265 U.S. 298 .....16, 22, 34

N

National Labor Relations Board v. Cherry Cotton Mills, 98 F. 2d. 444, 446 51

O

Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 ... 51
Re Otter Tail Power Company, 33 P.U.R. (N.S.) 257, 261 56

V

P

Page

Peoples Gas Co. v. Pub. Serv. Comm., 270 U.S. 550 35
Public Utilities Commission v. Attleboro Steam & Electric Company, 273 U.S. 83 ..... 23, 36
Public Utilities Commission v. Landon, 249 U.S. 236 ..... 23, 34

S

South Carolina Power Co. v. South Carolina Tax Commission, 52 F. 2d. 515 (E.D.S.C. 1931) aff'd 286 U.S. 525; 60 F. 2d. 528, aff'd *sub nomine* Broad River Power Co. v. Query, 288 U.S. 178 34
Southern Gas Corp. v. Alabama, 301 U.S. 148, 154, 155 35
St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 ..19, 51

T

Townsend v. Yeomans, 301 U.S. 441 31
Re Twin State Gas and Electric Company, 33 P.U.R. (N.S.) 39 60

U

United States v. Appalachian Electric Power Co., 107 F. 2d. 769, 791 (C.C.A. 4th) reversed 311 U.S. 377 (see pp. 403, 404, 429) 51

CONSTITUTION OF THE UNITED STATES.

Art. III, Sec. 2 51
Art. V of Amendments 51
Art. X of Amendments 51

STATUTES.

Conn. G. S. Rev. of 1930, Section 3599 35
Connecticut Cumulative Supplement (1935, Sec. 1414) cl. f, p. 592 35
Federal Power Act:
Sec. 3, sub-sections 3, 4, 7 54
Sec. 4 (e) 55
Sec. 4 (f) 56
Sec. 7 (a) 56
Sec. 10 (e) 56

Page

Sec. 10 (e) 56
Sec. 14 56
Sec. 19 56
Sec. 23 (b) 56
Section 201 ..... 4, 12, 13
Section 201 (a) 23, 27, 40, 45, 54
Section 201 (b) 32, 38
Section 201 (c) 16, 37
Section 201 (d) 54, 56
Section 201 (e) 32, 39
Section 201 (f) 54, 56
Section 203 (a) 3
Section 204 3
Section 204 (b) 3
Section 205 3
Section 208 26
Section 208 (a) 3
Section 301 ..... 3, 26, 32, 39, 56
Section 301 (a) 3
Section 302 ..... 26, 56
Section 302 (a) 3
Section 304 56
Section 304 (a) 3, 56
Section 306 55
Section 313 ..... 3, 55, 56
Section 313 (b) 1, 2, 3, 5, 18, 50
Judicial Code—Sec. 240, as amended 2

MISCELLANEOUS.

79 Congressional Record, Part 8, p. 8399 28
Part 9, ... 30
Part 10, ... 30
H. R. No. 1318, 74th Congress, 1st Session 27, 28, 29, 40
H. R. No. 1903, 74th Congress, 1st Session p. 74 ..... 41, 45
Senate Bill (S. 1725, 74th Congress, First Session) 40, 45, 78
Senate Substitute Bill (S. 2796) 27, 28, 40
Senate Report No. 621, 74th Congress 1st Session, p. 18 28
p. 48 27

In the

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 189

THE CONNECTICUT LIGHT AND POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF FOR PETITIONER.

OPINIONS.

The opinion of the Federal Power Commission, F.P.C. Opinion No. 75, May 15, 1942, is reported in 44 P.U.R. (NS) 170. (R. 63) The opinion of the Court of Appeals for the District of Columbia (R. 1170) is reported in 141 F. 2d 14.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on February 28, 1944. Petition for rehearing was filed by Petitioner on March 13, 1944 (R. 1179), and was denied on March 25, 1944. (R. 1195)

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act,* 49 Stat. 860, 16 U.S.C.,

* Hereinafter referred to as "the Act".

Section 825l(b), and Section 240 of the Judicial Code as amended, U.S.C., Title 28, Section 347.

Petition for certiorari was granted by this Court on October 9, 1944.

QUESTIONS PRESENTED.

1. Is a local electric distributing company, which does business entirely within one state, and which does not manufacture, transmit, or sell any electric energy consumed outside of that state, a "public utility" within the meaning of the Act, so as to be subject to the general jurisdiction of the Commission thereunder, because it receives, at a substation owned and operated by it in the center of an isolated district of its electric system, some electric energy originating in another state, which is used solely for the supply of local retail consumers in such district?

2. In reviewing the Commission's determination that electric energy originating in such other state was received into the company's electric system, must not the Court of Appeals, on petition for review, weigh the evidence and arrive at an independent determination as to such jurisdictional facts?

3. Was such electric distributing company a "public utility", so as to be subject to the general jurisdiction of the Commission, during periods preceding the hearing and determination of the Commission, because in addition to the facts stated in question "1" the company (as found by the Commission) received some electric energy originating in another state at points within the state and conducted the same over its lines for a few miles wholly within the State, and used the same solely for the supply of local consumers in two other small isolated districts of its electric system?

4. Was such electric distributing company a "public utility" so as to be subject to the general jurisdiction of the Commission, during a period preceding the hearing and

determination of the Commission, because the company transmitted and sold electric energy to a municipal corporation of the State in which the Company operates, and the municipality resold a portion of such energy, (comprising only 1/5 of 1% of the total amount of energy generated or received by the company) to a corporation which transmitted the same to a small island which is part of another state, located over seventy-five miles from the mainland of such other state, for local retail consumption on that island?

5. If such an electric distributing company was a "public utility" within the meaning of the Act during periods of time preceding the hearing and determination of the Commission, but ceased to occupy such status prior to the hearing and determination, is it proper for the Commission to direct the company to comply with its various accounting orders for any of such periods?

STATUTE INVOLVED.

The statute involved is the Federal Power Act, and the principal sections of importance here are Sections 3, 201, 301 (a), and 313 (a) and (b), printed in the appendix, pp. 63–67, *infra*.

STATEMENT.

A. THE PROCEEDINGS BELOW.

Under the provisions of the Federal Power Act, individuals or corporations occupying the status of a "public utility", as defined by the Act, are subject to broad regulatory powers of the Federal Power Commission over the lease and sale of facilities, mergers, consolidations, the acquisition of securities of other "public utilities" (Sec. 203 (a)); the issuance and guarantee of securities (Sec. 204); rates and charges (Sec. 205); the ascertainment of cost and depreciation of properties (Sec. 208 (a)); accounts and accounting (Sec. 301); rates of depreciation (Sec. 302 (a)); the filing of annual reports (Sec. 304 (a)); and other matters.

Whether individuals or corporations occupy the status of a "public utility" under the Act, depends upon whether they own or operate "facilities subject to the jurisdiction of the Commission" under Part II of the Act, whose provisions apply to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." Under Section 201, the Commission is given jurisdiction "over all facilities for such transmission or sale of electric energy," but it is provided that, except as specifically provided in Parts II and III of the Act, the Commission "shall not have jurisdiction . . . over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." This section became effective in 1935.

This case involves the construction of the phrases in Section 201 quoted above and the application of these phrases to the facilities of Petitioner in four districts in which the Commission held Petitioner owned facilities subject to its jurisdiction. (R. 64-69) Three of these districts, the Bristol, East Hampton, and Torrington-Winsted districts, were districts in Connecticut for which Petitioner purchased electric energy from other companies for local distribution. The fourth district was the Groton district, in Connecticut, in which Petitioner sold electric energy to the Borough of Groton, which in turn sold part of the energy to another company which transmitted it from Connecticut to Fishers Island, New York. Except at Bristol, all the facilities of Petitioner in these districts had, prior to the hearing before the Commission, been severed from any lines which were connected in any way with any lines running outside of the State. (R. 74)

The Commission, after hearings on its order to show cause directed to Petitioner and on the answer of Petitioner

thereto,* entered an order on May 15, 1942, which by reference incorporated specific findings of fact and also a discussion entitled "opinion". (R. 83) The Commission determined that Petitioner "was a public utility", during various specified periods since August 25, 1935, but ending prior to the hearing and decision, by reason of Petitioner's facilities and operations in its East Hampton, Torrington-Winsted, and Groton districts. The Commission further determined that Petitioner "continued to be" a public utility subject to its jurisdiction by reason of Petitioner's facilities in its Bristol district. (R. 63–82) The order requires Petitioner to comply currently with accounting requirements applicable to such public utilities.

On June 13, 1942, Petitioner filed a petition for rehearing and stay of order. (R. 1155) This was denied by the Commission on June 23, 1942. (R. 84) The Commission in the order denying the petition did, however, extend the time within which Petitioner should commence the studies and work necessary to comply with the order.

On August 18, 1942, Petitioner filed in the Court of Appeals a petition for review pursuant to Section 313(b) of the Federal Power Act. (R. 1) After hearing, the Court below** affirmed the order of the Commission (R. 1178) and later denied a petition for rehearing. (R. 1195)

B. GENERAL CHARACTER OF PETITIONER'S BUSINESS.

Petitioner is a local electric distributing company, distributing electric energy generated and purchased by it within the State of Connecticut and, except for facilities in the above mentioned four districts, there is no finding that

---

* The answer denied that Petitioner had been a public utility subject to the jurisdiction of the Commission, and admitted that its accounts had not been kept in accordance with accounting orders of the Commission applicable to public utilities subject to the jurisdiction of the Commission.

** The Court consisted of Mr. Justice Miller, Mr. Justice Arnold (who wrote the opinion) and Judge Dobie.

Petitioner ever owned any facilities subject to the jurisdiction of the Commission.

The territory served directly by Petitioner covers a substantial part of the State of Connecticut. It serves electric energy in 107 towns, cities, and boroughs, which have a total population of about 660,000, not including about 130,000 served by other Connecticut utilities purchasing substantially all of their electric requirements from Petitioner. (R. 86-87)

It was established by uncontradicted evidence that since Aug. 26, 1935,* Petitioner has owned or operated no property outside of Connecticut. It has owned no line which crosses the Connecticut boundary. It has owned no line connecting at the Connecticut state line with the line of any other utility. It has had no contract with any party outside of the State of Connecticut for the purchase or sale of electric energy. It has had no contract to deliver electric energy outside of Connecticut, or to receive electric energy outside or from outside of Connecticut. It has not bought or sold any electric energy outside of Connecticut. It has had no contract or arrangement calling for delivery of electric energy to any other company or utility at the state line or for the receipt of energy from any other company or utility at the state line. (R. 119-125)

C. PETITIONER'S SUPPLY FOR ITS BRISTOL, EAST HAMPTON AND TORRINGTON-WINSTED DISTRICTS.

The theory of the Commission that in the Bristol, East Hampton and Torrington-Winsted districts Petitioner owned or operated facilities subject to the jurisdiction of the Commission was predicated upon the establishment of three conclusions: (1) that energy of Massachusetts origin at times supplied part or all of the loads of Pe-

---

* The date upon which the amendment to the Federal Power Act became effective.

titioner, (2) that in these districts, some of Petitioner's facilities were facilities for transmission of electric energy in interstate commerce, and (3) that some of such facilities were not used in local distribution.

There was no finding as to the amount of electric energy transmitted from Massachusetts which came to these facilities of Petitioner or what part of the total amount of electric energy coming to these facilities came from Massachusetts. The testimony supporting the findings of the Commission was limited to a comparatively few hours of each year. (R. 454–455, 543–557, 947–949, Ex. 85, R. 1150–1151)

The facilities of Petitioner which the Commission held subject to its jurisdiction are indicated in red on the map which is appended hereto after p. 79. The Bristol, East Hampton, and Torrington-Winsted districts were not, during the respective periods when the Commission found the facilities subject to its jurisdiction, connected with the main system of Petitioner (see R. 137, 391–395) which is not shown on the map.

The facilities owned and operated by Petitioner which are used to receive electric energy for the supply of its Bristol District, consist of a substation and appurtenances contained therein, which are connected with the Connecticut Power Company's high tension line in Bristol, Connecticut, which are used to receive electric energy from the high tension line; to lower the voltage thereof; and to eliminate fluctuation in the voltage, for local retail distribution of the energy to the Company's consumers in the Bristol District. (R. 68–69, 838–846)

The facilities owned and operated by Petitioner in the Torrington-Winsted district which the Commission found were subject to its jurisdiction were a substation at Torrington with facilities for raising voltage from 2,300 to 27,600 volts, a substation at Winsted with facilities for lowering voltage from 27,600 to 4,600 volts, and a 27,600 volt double circuit wood pole line about 10 miles in length,

between those two substations. (R. 68. See also map at end of this brief.) These were all disconnected from the lines of Connecticut Power Company before the hearing before the Commission. (R. 73–74)

The facilities of Petitioner which the Commission found were subject to its jurisdiction in the East Hampton district consisted of substation facilities for reducing voltage from 13,800 volts to 4,600 volts at Petitioner's Leesville substation, and to 2,300 volts at its East Hampton, Colchester, Comstock Bridge, Collins Hill, and Westchester substations, and the 13,800 volt lines connecting them to the facilities of The Connecticut Power Company at Pole 110 in Portland. (R. 66–67) These facilities were disconnected from the lines of the Connecticut Power Company in June, 1939—long before this proceeding was instituted by the Commission. (R. 66, 74)

These three districts were supplied by energy from the so-called C.P. lines, with which all three of these districts were connected. The term "C.P. lines" is an abbreviation for "Connecticut Power lines," the lines being owned by the Connecticut Power Company.* These lines consist of two circuits which transmit energy at 66,000 volts. They are located wholly in the State of Connecticut and run from a bus at a substation of the Connecticut Power Company, in Hartford, in a westerly direction to a generating plant owned by the Connecticut Power Company at Falls Village, Connecticut, near the New York line. (Ex. 38; R. 684–686; see also Exs. 70 and 73)

That substation of the Connecticut Power Company is

---

* The Connecticut Power Company is a corporation entirely separate from Petitioner. The Connecticut Power Company and the Hartford Electric Light Company, which is referred to hereafter, were not affiliated in any way with Petitioner. Petitioner owned no stock in either of these companies, and neither of them owned any stock in the Petitioner. No person who was at any time an officer or director of Petitioner served simultaneously in a similar capacity either the Connecticut Power Company or the Hartford Electric Light Company. (R. 975–976)

djacent to the large steam generating plant of the Hartord Electric Light Company and other steam plants of hat company. All of these plants are connected electricly with the C.P. lines. (R. 390–391, 969–970)

For the Winsted district Petitioner purchased energy rom the Torrington Electric Light Company, which obained its supply either from its own plant or from the Connecticut Power Company. For the East Hampton and Bristol districts Petitioner purchased energy directly from Connecticut Power Company. (Ex. 8, R. 1039, Ex. 25, 1055; Ex. 11, R. 1044) These contracts contained no express provisions as to the source of the energy, but there was a provision that the unit charge for energy supplied should be adjusted on the basis of the cost of coal in the bunkers of the South Meadow plant of the Hartford Company in Hartford.

The Connecticut Power Company at all times had an understanding with the Hartford Electric Light Company under which the Hartford was obligated to supply such capacity as might be required, in addition to the capacity of the Connecticut Power Company's own water power plants,* to carry the loads on the C.P. lines, including those at Bristol, at Middletown (which included the East Hampton area of Petitioner), and at Torrington (which included the Winsted district of Petitioner). This understanding was eventually embodied in formal contracts, the one relating to Middletown and Torrington being dated June 1, 1936, and the one relating to Bristol being dated June 8, 1937. (Exs. 30, R. 1063; 36, R. 1072; 37, R. 1081; R. 941-944, 961, 964-966)

The Commission based its conclusion as to the presence of out-of-state energy on Petitioner's facilities connected

---

* These plants of the Connecticut Power Company are all located in Connecticut.

with the C.P. lines upon the fact that a 66,000-volt double-circuit line running from Agawam, Massachusetts, across the Connecticut-Massachusetts boundary was connected to the bus in the substation of the Connecticut Power Company, at Hartford, mentioned above. Through this line the Connecticut Power Company at times obtained electric energy which was generated outside of Connecticut through the operation of the so-called Connecticut Valley Power Exchange. (R. 66) Petitioner is not a member of this Exchange. (R. 275-276)

The companies which contracted to supply those loads of Petitioner which were connected with the C.P. lines (i.e., those in the three districts under discussion) have at all times been able to obtain the necessary supply from generating plants located in Connecticut, and at no time were the combined loads of Petitioner in these three districts greater than the amount of electric energy generated contemporaneously by plants in Connecticut which were connected with the C.P. lines. (R. 949-953) If any Massachusetts energy reached Petitioner's facilities in these three districts, it had been transformed and divided for local distribution before reaching Petitioner's facilities. (R. 689-690, 699-700)

D. SALES TO THE BOROUGH OF GROTON AND RESALES TO THE FISHERS ISLAND COMPANY.*

The Commission also found that until February 28, 1941, Petitioner owned facilities at or near Groton and Montville and between those places which were subject to the jurisdiction of the Commission. (R. 64, 65) Its finding was based on the fact that Petitioner sold electric energy to the Borough of Groton, most of which the Borough of Groton

---

*"Fishers Island Company" is employed throughout this brief to denote the corporation engaged at the corresponding period of time in purchasing electric energy from the Borough of Groton for supply to Fishers Island.

used for local distribution in Connecticut, but part of which it sold and delivered to another company which transmitted the energy from Connecticut to Fishers Island, New York, for local distribution there. (R. 64, 533) The amount of such energy which went to Fishers Island was only about 1/5 of 1% of the total amount of energy generated and received by Petitioner, and no energy generated or transmitted by Petitioner has gone to Fishers Island since February, 1941. (R. 835-836, 196-197) All of the energy which went to Fishers Island had been transformed before leaving Connecticut. (R. 199-203)

E. THE DECISION OF THE COURT BELOW.

The Court of Appeals held, without discussion of the legal principles involved, that in each of the four districts Petitioner had facilities "for transmission of electric energy in interstate commerce". (R. 1170-1178)

The Court did not discuss the question whether the facilities by which Petitioner distributed energy in the Bristol, East Hampton and Torrington-Winsted districts were "used in local distribution", saying that it was not relevant to the case. This conclusion was based upon its construction of the Act to the effect that the last sentence of Section 201 (b) of the Act does not exempt from the jurisdiction of the Commission a company which owns only facilities used in local distribution. The Commission itself in its opinion in this case did not adopt or suggest this construction, and as far as we are aware its attorneys had not urged this construction of the Act until recently.

The Court of Appeals held, without discussion of its duty to weigh the evidence, that as to the questions of fact the sole question was whether the findings of the Commission were "sustained by substantial evidence", and it concluded that there was substantial evidence that energy generated in Massachusetts reached facilities of Petitioner

in Connecticut at its East Hampton, Torrington-Winsted and Bristol districts.

The Court also held that the facilities of Petitioner at or near Groton had been subject to the jurisdiction of the Commission, but recognized the fact that after February, 1941, this was no longer the situation. In discussing the Groton situation, it made no mention of the contention of Petitioner that, under proper construction of the statute, sales to a municipal corporation could not be the basis of jurisdiction of the Commission.

The Court paid no particular attention to the fact that the status of Petitioner may have changed after the effective date of the Act but before the hearings and determination of the Commission. Its decision seems to rest in large part upon the fact that Petitioner discontinued its arrangements and connections with the Connecticut Valley Power Exchange prior to the effective date of the Act.

SPECIFICATION OF ERRORS.

The Court of Appeals for the District of Columbia erred:

1. In holding that Petitioner *is* a "public utility" subject to the jurisdiction of the Commission under the Act, *i.e.*, as of the date of the Commission's determination, and in affirming the order of the Commission requiring current compliance with its accounting orders and system of accounts at the time of the making of its determination and for the future; and specifically in holding that any facilities of Petitioner in its Bristol district are facilities for "transmission of electric energy in interstate commerce" within the meaning of §201 of the Act, and in refusing to hold that all facilities in the Bristol district are exempt from the jurisdiction of the Commission as "facilities used in local distribution".

2. In affirming the order of the Commission insofar as such order was based upon the Commission's determina-

tion that Petitioner *was* such a "public utility" subject to its jurisdiction under the Act during past periods, by reason of Petitioner's ownership and operation of facilities for the receipt and distribution of electric energy in its Bristol, East Hampton or Torrington-Winsted districts. And specifically in holding that any facilities of Petitioner in these districts were facilities for "transmission of electric energy in interstate commerce" within the meaning of §201 of the Act, and in refusing to hold that all facilities in these districts were exempt from the jurisdiction of the Commission as "facilities used in local distribution".

3. In holding that a company is such a "public utility", subject to the general jurisdiction of the Commission under the Act, even though its only facilities over which flows electric energy generated in another State are facilities "used in local distribution".

4. In affirming the order of the Commission insofar as such order was based on the Commission's determination that Petitioner was a "public utility" under the Act, during a past period, by reason of Petitioner's ownership and operation of facilities for the sale and delivery of electric energy to the Borough of Groton. And specifically in holding that any such facilities were facilities for "transmission of electric energy in interstate commerce" or for "the sale of electric energy at wholesale in interstate commerce" within the meaning of § 201 of the Act; in refusing to hold that all such facilities were exempt from the jurisdiction of the Commission because used in sales to a municipal corporation; and in refusing to hold that the amount of energy which was transmitted to Fishers Island was so negligible that it must be disregarded.

5. In determining Petitioner's status under the provisions of the Act, by reference to Petitioner's acts in separating itself from the Connecticut Valley Power Exchange prior to the effective date of the 1935 amendments to the

Act, and further in determining Petitioner's status under the Act by the application of standards which are not contained in the Act or in any other applicable statute.

6. In holding that the Court was under no duty to weigh the evidence in regard to jurisdictional facts and to make its own determination thereon. This was based upon improper construction of the statute, or, if its construction of the statute was correct, the statute is unconstitutional—

(a) In that it deprives Petitioner of property without due process of law in violation of the provisions of Article V of the Amendments to the Constitution of the United States;

(b) In that it curtails the powers of the Judiciary in violation of the provisions of Article III of Section 2 of the Constitution; and

(c) In that it confers on the United States a power reserved to the State of Connecticut.

SUMMARY OF ARGUMENT.

I.

PETITIONER IS NOT A "PUBLIC UTILITY" UNDER THE PROVISIONS OF THE FEDERAL POWER ACT AND THEREFORE IS NOT CURRENTLY SUBJECT TO ACCOUNTING REGULATION BY THE FEDERAL POWER COMMISSION.

This point relates to Petitioner's status at the time of the hearing and determination of the Commission and deals solely with the facilities at Bristol.

A. The Act was not intended to regulate a local distributing company like the Petitioner.

The primary purpose of the Act was to regulate interstate sales of electric energy and not to regulate a local distributing company. This appears in Section 201 (a) of the Act, which provides that Federal regulation is to "extend only to those matters which are not subject to regulation by the States" and from the opinion of this Court in *Jersey*

Central Power & Light Co. v. *Federal Power Commission*, 319 U.S. 61, 67–68.

No purpose would be served by Federal regulation of Petitioner at Bristol, where it engaged in local distribution. Before Petitioner receives the energy and distributes same to its customers in Bristol, the Federal Power Commission *presumably has already exercised its function* of regulating the company or companies which produced the energy in Massachusetts and transmitted the same to and across the state line into Connecticut. This is not a situation where "cost would be fixed prior to the incidence of federal regulation" as the situation in the *Jersey Central* case. When Petitioner receives the energy at Bristol, the "incidence of Federal regulation" has not only been reached but passed. If, however, Petitioner is a "public utility" within the meaning of the Act, the Commission would possess many regulatory powers over the Petitioner, none of which is necessary to carry out the purposes of the Act.

The legislative history of the Act shows that it was not intended to regulate local distributing companies. The situation presented is one wherein Congress did not attempt to preempt the whole field to the fullest extent of its constitutional power, and "the narrow question" presented is "what Congress did, not what it could do", as in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, 355.

B. The Act gives general jurisdiction to the Commission over a company only if it owns facilities for "the transmission of electric energy in interstate commerce" or "the sale of electric energy at wholesale in interstate commerce", and Petitioner owns no such facilities at Bristol.

As no question of any such sale is involved, the question is whether Petitioner owns any facilities for transmission in interstate commerce. Under the traditional concepts of interstate commerce, this Court had held prior to the enactment of the Act that sale and delivery to local consumers at

retail did not constitute "any part of interstate commerce" even though the commodity sold had been brought from another state and was drawn for distribution directly from interstate mains. As the Court said in *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 308, "with the delivery . . . to the distributing companies . . . the interstate movement ends". The situation here presented is similar to numerous cases in which this Court has held that interstate commerce ended before the activities of a local distributing company began.

As the companies which contracted to supply the load of Petitioner at Bristol have at all times been able to obtain the necessary supply from generating plants located in Connecticut, it is clear that the State Commission had jurisdiction over its contracts and all of its facilities; and, as appears from the language of the Act itself and its legislative history, Congress intended to preserve jurisdiction of the state over them and not to bestow such jurisdiction on the Federal Power Commission.

The provisions of Section 201 (c) of the Act should not be construed to stamp as facilities subject to the jurisdiction of the Commission all facilities for conveyance of electric energy from the point of generation in one state to the point of consumption in another state.

C. "Facilities used in local distribution" are exempt from the jurisdiction of the Commission, and all the facilities of Petitioner at Bristol are "facilities used in local distribution".

Facilities used in local distribution are exempt from the jurisdiction of the Commission. The Court below erred in concluding the contrary, and in doing so lost sight of the structure of the Act and its legislative history. These indicate clearly that the provision of the Act, "but [the Commission] shall not have jurisdiction . . . over facilities used in local distribution", was intended to create an exemption of

such facilities even if they are facilities "for transmission of electric energy in interstate commerce".

The exemption should be construed to exempt all the facilities of a local distributing company beyond the point of delivery of the electric energy to it. In construing the phrase, "facilities used in local distribution", the question is not whether such facilities are to be characterized as "transmission" or "distribution" facilities. These are terms upon which experts may differ in their application to particular circumstances. The question is merely whether the facilities are actually "used in local distribution". This view is established both by the language of the Act and its legislative history. It is notable that regulations for accounting of the Federal Power Commission, and also the Uniform System of Accounts for Electric Utilities of the National Association of Railroad and Utilities Commissioners, and of the Public Utilities Commission of the State of Connecticut classify as "distribution stations" stations which change the energy from transmission to distribution voltage.

The facilities of Petitioner at Bristol which the Commission found subject to its jurisdiction were all in such a distribution station—beyond the point of the delivery of electric energy to Petitioner.

D. The Court below erred in concluding that Petitioner's business was essentially interstate by reason of Petitioner's operations prior to the effective date of the Act.

The Court stressed the fact that Petitioner terminated its membership in the Connecticut Valley Power Exchange, an association for the interchange of electric energy between Connecticut and other states, before the effective date of the Act, and stated that the character of its system can be judged from its activities before that time.

The reasoning of the Court below is subject to several criticisms. As this Court said in the *Jersey Central* case, the Commission's power extends only over facilities "which transmit energy actually moving in interstate commerce" and "the determinative fact is the ownership of facilities used in transmission." Obviously the Commission can not acquire jurisdiction over any of Petitioner's facilities *unless they were facilities over which energy actually moved* in interstate commerce at the time as of which jurisdiction is asserted.

Moreover the evidence does not show what part of the business of Petitioner was involved in its participation in the Exchange. As a matter of fact, it was a comparatively unimportant part of the business of Petitioner. It was improper for the Court below to assume, in the absence of evidence, that its participation in this Exchange rendered the business essentially an interstate business.

II.

THE COURT BELOW ERRED IN REFUSING TO WEIGH THE TESTIMONY AS TO JURISDICTIONAL FACTS.

An essential basis for jurisdiction of the Commission is establishment of the fact that at Bristol and two other areas Petitioner purchased energy which included electric energy in substantial amounts transmitted from Massachusetts. The Court below disregarded our contention that it was under the duty of weighing the evidence and making its own determination of this jurisdictional fact, and considered that the question was merely whether there was substantial evidence to support this finding of the Commission.

The statute providing for a review (Section 313, (b)) should not be construed in such a way as to raise grave doubt as to its constitutionality. If it were construed to relieve the reviewing court of the duty of making its own independent determination of the jurisdictional fact, it would be

unconstitutional. *Crowell* v. *Benson*, 285 U.S. 22; *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 51, and other cases.

III.

PETITIONER WAS NOT A "PUBLIC UTILITY" UNDER THE PROVISIONS OF THE FEDERAL POWER ACT" AT ANY TIME SINCE THE EFFECTIVE DATE OF THE 1935 AMENDMENTS TO THE ACT.

This point relates to connections for the supply of the East Hampton and Torrington-Winsted districts and the connection between the Borough of Groton and Fishers Island, New York, all of which were discontinued prior to the hearing and determination of the Commission.

The situation in the first two of these districts differed from that in the Bristol district only in respect of the nature of the facilities, which included some short electric lines for conveyance of electric energy received within the State of Connecticut for local distribution, but (as found by the Commission) some of which originated in Massachusetts.

The same principles apply to these districts as to the Bristol district. In these districts, as in the Bristol district, the receipt of the electric energy from Petitioner's vendors terminated the interstate journey of the energy. Moreover, all of the facilities in these two districts came within the exemption of "facilities used in local distribution."

Facilities owned and operated by Petitioner for the transmission and sale of electric energy to the Borough of Groton were not subject to the jurisdiction of the Commission for two reasons.

First, the Borough of Groton is a municipal corporation having authority to distribute power; and, under the definitions contained in the Act, sales to such a corporation are exempt from the jurisdiction of the Commission and such

a corporation is entirely exempt from the provisions of Part II of the Act.

In such circumstances no "incidence of federal regulation" occurred and it cannot be said that without general jurisdiction of the Commission over Petitioner, "federal rate control would be substantially impaired, if not rendered futile," as in the *Jersey Central* case. The Act should *not be construed as subjecting to the jurisdiction of the Commission* facilities used in transmission in connection with such a sale.

Secondly, the sale of energy by the Borough of Groton to Fishers Island should be disregarded under the doctrine of *de minimis non curat lex*. The amount of electric energy which was transmitted to Fishers Island was only about one-fifth of one per cent. of all the energy generated and received by Petitioner. But if the sales to Groton or the transmission facilities used for them are held subject to the jurisdiction of the Commission, the result is not merely to submit these particular sales and facilities to the jurisdiction of the Commission, but to submit a very large part of the activities of Petitioner's entire business in over one hundred towns and cities and boroughs to the jurisdiction of the Commission.

IV.

PETITIONER IS NOT NOW A PUBLIC UTILITY WITHIN THE MEANING OF THE FEDERAL POWER ACT, AND NO USEFUL PURPOSE WOULD BE SERVED IN REQUIRING IT TO COMPLY WITH ORDERS APPLICABLE TO PUBLIC UTILITIES EVEN IF IT HAS BEEN SUCH A PUBLIC UTILITY AT ANY TIME.

If it should be held that Petitioner has engaged in some activities or has had some facilities which rendered it a public utility, it does not follow that it is still subject to the jurisdiction of the Commission. Unless it should be held that some of Petitioner's facilities at Bristol render it subject to the jurisdiction of the Commission, there is no

ground for any contention whatever that Petitioner is now a public utility. There is nothing in the Act which indicates that if a company has once been a public utility it shall continue to be treated as such after the activities which have rendered it such have ceased. If Petitioner was a public utility but has ceased to be such, it would serve no useful purpose now to compel Petitioner to go to the vast *expense and trouble required to make up accounts and compile* and furnish information with regard to the original cost of all of its facilities for past years in the way required by the Commission.

ARGUMENT.

I.

PETITIONER IS NOT A "PUBLIC UTILITY" UNDER THE PROVISIONS OF FEDERAL POWER ACT, AND THEREFORE IS NOT CURRENTLY SUBJECT TO ACCOUNTING REGULATION BY THE FEDERAL POWER COMMISSION.

At the time of the hearing and determination of the Commission, Petitioner's electric system was not (and is not now) connected with any source of electric energy originating in another state, except at Bristol. Moreover, Petitioner's electric system was not then (and is not now) connected with any lines carrying electric energy from Connecticut to another state.

The sole claim of the Commission to current general jurisdiction over Petitioner and its accounts therefore relates to the facilities in the substation at Bristol, at which Petitioner receives the electric energy from its vendor for the supply of local retail consumers in the Bristol district.

Assuming, *arguendo*, that some electric energy from Massachusetts actually passes through such facilities, we nevertheless submit that a study of the Federal Power Act, its legislative history, and its recognized purposes discloses that the Act was never intended to endow the Commission with jurisdiction over such facilities, or with general jurisdiction over such a local distributing company.

A. THE FEDERAL POWER ACT WAS NOT INTENDED TO REGULATE A LOCAL DISTRIBUTING COMPANY LIKE THE PETITIONER, WHICH DOES NOT GENERATE, TRANSMIT OR SELL ANY ELECTRIC ENERGY CONSUMED OUTSIDE OF THE STATE IN WHICH THE COMPANY OPERATES.

1. The Primary Purpose of the Federal Power Act Was to Regulate Interstate Sales of Electric Energy and it Was not Intended to Regulate Local Distributing Companies.

In *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 67, 68, 70, 71, 86, both the majority and minority opinions in this Court pointed out that the Federal Power Act was designed to fill the hiatus in regulation, in respect to interstate sales of electric energy *at wholesale*, left by the decision in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (273 U.S. 83).

Compare:

> *Public Utilities Commission* v. *Landon*, 249 U.S. 236;
> *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298.

The majority opinion in the *Jersey Central* case said:

> "The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act . . . was to give a federal agency power to regulate the sale of electric energy across state lines. Regulation of such sales had been denied to the states by *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U.S. 83. On account of the development of interstate sales of electric energy, it was deemed desirable by Congress to enter this field of regulation." (*Jersey Central Power and Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 67–8.)

The purpose thus expressed is disclosed, in part, by the declaration of policy appearing in Section 201 (a) of the Act (49 Stat. 847, 16 U.S.C. Title 16, § 824(a)), as follows:

"(a) It is hereby declared that the business of *transmitting and selling** electric energy for *ultimate* distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy *in interstate commerce* and the sale of such energy *at wholesale in interstate commerce* is necessary in the public interest, such *Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*"

In the *Jersey Central* case, *supra*, this Court held that where a New Jersey electric company generated and sold electric energy to a second company in the State of New Jersey, and a portion of such energy found its way into the State of New York (through a connection maintained by the purchaser with a third company serving ultimate consumers in New York), an electric line owned and operated by the first company, by which the energy was delivered to the second company, was a facility for "the transmission of electric energy in interstate commerce", and that the first company was a "public utility" under the Act. In holding that the Act did not contemplate the exercise of jurisdiction only where a company owns facilities which *cross* a state line, the Court again pointed to the purpose of the Act as follows:

"The purpose of this act was primarily to *regulate the rates and charges of the interstate energy.* If *intervening companies* might purchase *from producers in the state of production*, free of federal control, *cost would be fixed prior to the incidence of federal regula-*

* Throughout this brief, the italics are ours.

tion and federal rate control would be substantially impaired, if not rendered futile." (*Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 71–2).

Bearing in mind the "primary purposes" of the Federal Power Act, *i.e.*, to exercise control which had not previously been exercised by Congress over interstate sales of electric energy at *wholesale* (which control could not be exercised by the states) and at the same time to preserve to the states their existing powers to regulate intrastate utility companies and their local sales at retail, it is apparent that the Commission's assertion of jurisdiction in the present case is not in accord with such purposes.

Petitioner does not generate electric energy which is sold at wholesale in interstate commerce (as was the case in *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, certiorari denied, 319 U.S. 741); nor does Petitioner transmit electric energy which is resold at wholesale and ultimately consumed in another state (as was the case in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61). Instead of generating or transmitting, in the State of Connecticut, electric energy which is ultimately consumed outside of the State, Petitioner here *receives* energy within Connecticut *for local distribution and retail sale to consumers within the State.*

What purpose would be served by Federal regulation in such a case? Before Petitioner receives the energy and distributes the same to its consumers within the State, the Federal Power Commission presumably has *already* exercised its function of regulating the company or companies which produced the energy in Massachusetts and transmitted the same to and across the State line into Connecticut, including the regulation of wholesale rates subject to the Commission's jurisdiction. This is not a situation

where "cost would be fixed prior to the incidence of federal regulation", as was said in the *Jersey Central* case, *supra*. When Petitioner receives the energy at Bristol, the "incidence of federal regulation" has not only been reached but *passed*. In the interstate sale of the energy, the cost has already been fixed by the Commission. Thenceforth no interstate transactions take place and no federal rate control is involved. Petitioner's costs are subject to the supervision of the State of Connecticut for the purpose of regulating the intrastate retail rates. (See authorities cited on p. 35, *infra*.)

Section 208 of the Act requires every public utility upon request to file with the Commission "an inventory of all or any part of its property and a statement of the original cost thereof". This provision and others in the same section apply not only to property over which the Commission has jurisdiction but to all of the property of the company.

Section 301 requires public utilities to keep accounts, etc., as the Commission may by rules and regulations prescribe. It is apparent that the Commission construes this section as requiring a company found by it to be a public utility to keep accounts as to all of its property as the Commission may prescribe.*

Section 302 authorizes the Commission to require public utilities to keep adequate depreciation accounts and to fix adequate rates of depreciation "of the several classes of property" of each public utility in accordance with rules of the Commission. Apparently the depreciation rates thus fixed may eventually be applied not only to facilities over which the Commission has jurisdiction but also to all other facilities of the Company.

Under the present order of the Commission, Petitioner

---

* See opinion and order, *In the Matter of Hartford Electric Light Company*, Docket No. IT-5560.

would be required to install the system of accounts prescribed by the Commission, and to follow the same with respect to all of its transactions in the State of Connecticut, and also to file inventories and original cost studies with respect to all of its property in the State of Connecticut. Under the determination that Petitioner is a "public utility", the Commission would possess many other regulatory powers over Petitioner, as noted elsewhere herein.

We contend that all of the purposes of the Act are fulfilled if, as here, the company which did transmit energy across the State line, i.e., the Connecticut Power Company, is subject to the jurisdiction of the Commission, and that it was not the intention of Congress to submit a local distributing company to the jurisdiction of the Commission merely because the supply which it purchased and received in the State and used in local distribution there happened to include some energy generated in another State.

2. The Legislative History of the Federal Power Act Shows that it Was Not Intended to Regulate Local Distributing Companies.

The reports of both the Senate Committee and the House Committee on the bill contained the following statement in regard to Section 201(a):

> "Subsection (a) contains a declaration of the necessity for federal regulation and *defines the scope of that regulation* . . ." Senate Report 621, 74th Congress, 1st Session, p. 48. House Report 1318, 74th Congress, 1st Session, p. 26.

The provision for jurisdiction over facilities in Section 201(a) of the Bill as reported to the Senate by the Senate Committee (designated S 2796) and as the Bill passed the Senate was as follows:

> "The Commission shall have jurisdiction over all

> facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, *except facilities used* only for the production or transmission of electric energy in intrastate commerce or *in local distribution or* for the use of the producer or transmitter."

The House Committee on Interstate and Foreign Commerce, however, rewrote this provision and the Bill, as reported by it to the House (S 2796, with amendments), substituted for the sentence quoted above one which is substantially the same as that in the Act as passed.*

The Report of the Senate Committee on Interstate Commerce which accompanied the Bill (S 2796) in the form in which it was presented to the Senate (with the broad language quoted above) stated that it "would impose Federal regulation only over those matters which cannot be effectively controlled by the States". (Senate Report No. 621, page 18, 74th Congress, 1st Session.)

And on the floor Senator Wheeler, who was in charge of the Bill, said (Congressional Record, Vol. 79, Part 8, p. 8399):

> "Utility operations, except where they extend beyond state lines, are of course matters of local or state concern; . . .".

The Report of the House Committee on Interstate and Foreign Commerce (Report No. 1318, House of Representatives, 74th Congress, 1st Session) contained the following language (pp. 7–8):

---

* The only difference is that there were inserted the words "except as specifically provided in this Part and the Part next following." This was done merely for the sake of clarification. (See p. 41, *infra*.)

"The new parts are designed to meet the situation which has been created by the recent rapid growth of electric utilities along interstate lines. The percentage of electric energy generated in the United States that was transmitted across State lines increased from 10.7 in 1928 to 17.8 in 1933. The amount of energy transmitted in interstate commerce in 1933 was greater than all of the energy generated in the country in 1913. Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.*, (273 U.S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.

. . . . .

"The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. Provision is made for joint boards composed of members of State commissions which may be used for this purpose. The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill."

. . . . .

And on page 27:

> "Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, but does not apply to any other sale of electric energy or deprive a State of any lawful authority now exercised over the exportation of hydroelectric energy transmitted out of the State. As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State. As in subsection (a), the provisions of the Senate bill relating to the production of electric energy for interstate transmission and facilities for such production are omitted."

The House enacted Parts II and III in substantially the form so reported. Throughout the discussion on the floor of the House there appear abundant manifestations of Congressional purpose to preserve to the States the powers which they then had.

> See 79 Cong. Rec. Part 9, pp. 10357, 10377, 10378, 10384–10387, and Part 10, 10574.*

---

* Moreover, when the Federal Power Act was under discussion upon the floor of the House, Representative Cole of Maryland, a member of the Committee on Interstate and Foreign Commerce, said of the provisions of Part II that the Committee had "tried—and I think successfully—to avoid . . . the extension thereof [of Federal control] into intrastate activities in the way that the Shreveport case might permit."

79 Cong. Rec. Part 9, 10384.

The familiar doctrine of the Shreveport case (*Houston, East & West Texas Railway Co.* v. *U. S.*, 234 U.S. 342) is that the Interstate Commerce Commission can properly regulate intrastate railroad rates where they are so low as to discriminate against and work direct injury to interstate commerce. That is the doctrine which Congress intended should not be applied in interpreting the powers of the Federal Power Commission.

The situation thus presented under the Federal Power Act is not one wherein Congress attempted to preempt the whole electric utility field to the fullest extent of its constitutional power under the commerce clause, but clearly displays a conscious effort to keep the jurisdiction asserted within defined bounds.

Under such circumstances, "the narrow question" presented is, "what Congress did, not what it could do", as in

> *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, 355.

Where Congress speaks in limited terms in a field hitherto left untouched, "an intention to override existing state authority . . . is not to be imputed to the Congress unless its enactment compels that conclusion".

> *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Comm.*, 283 U.S. 380, 391.

And this doctrine is no less applicable where the existing state authority has hitherto been exercised over matters incidentally affecting or burdening interstate commerce.

> *Townsend* v. *Yeomans*, 301 U.S. 441.

The Federal sphere of jurisdiction is to be carefully limited where, as in the present situation, the Federal act specifically provides for preservation of existing state authority.

> *Hartford Indemnity Co.* v. *Illinois*, 298 U.S. 155.

As the Court said in *Florida* v. *United States*, 282 U.S. 194, 211–212:

> "The propriety of the exertion of the [federal] authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what

would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

From the foregoing general considerations we believe it is apparent that Congress did not intend that a local distributing company, such as Petitioner, should be subject to the broad general jurisdiction of the Commission. With this background in mind, we pass to an examination of the statutory provisions relating to the Commission's jurisdiction over facilities.

B. PETITIONER'S FACILITIES AT BRISTOL ARE NOT FACILITIES "FOR THE TRANSMISSION OF ELECTRIC ENERGY IN INTERSTATE COMMERCE", WITHIN THE PURVIEW OF THE FEDERAL POWER ACT.

The Commission's authority to prescribe and order compliance with a system of accounts is contained in section 301 of Part III of the Federal Power Act (49 Stat. 854, 16 U.S.C. Title 16, § 825(a)) which, by its terms, applies only to "every licensee and *public utility.*" Since Petitioner is not a "licensee" under Part I of the Act, the Commission's authority to make the order under review in this proceeding, can exist only if Petitioner is a "public utility" within the meaning of the Act.

Jersey Central Power & Light Co. v. *Federal Power Commission*, 319 U.S. 61, 67, note 6.

A "public utility" is defined in Section 201 (e) of Part II of the Act (49 Stat. 848, 16 U.S.C. Title 16, § 824 (e)), as follows:

> "(e) The term 'public utility' when used in this Part *or in the Part next following* means any person who owns or operates facilities subject to the jurisdiction of the Commission *under this Part.*"

The facilities which are subject to the jurisdiction of the

Commission (and those which are not) are specified in subsection (b) of section 201, which governs the application of Part II of the Act and provides as follows:

> "(b) The provisions of this Part shall apply *to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy* or deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. *The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction*, except as *specifically provided* in this Part and the Part next following, over facilities used for the generation of electric energy *or over facilities used in local distribution* or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

The ultimate question in this case, therefore, is whether the facilities owned and operated by Petitioner at Bristol are subject to the jurisdiction of the Commission under the foregoing provisions.

We contend that, regardless of the effect of the above clause relating to "facilities used in local distribution", Petitoner's facilities at Bristol are not subject to the jurisdiction of the Commission because they are not facilities "for transmission of electric energy in interstate commerce" within the meaning of the Act. As this Court said in the *Jersey Central* case, *supra* (at p. 72):

> ". . . Commission power does not extend over all connecting transmitting facilities but only over those which

transmit energy actually moving in interstate commerce. Mere connection determines nothing."

The situation here is similar to that presented by cases involving gas companies.

In *Public Utilities Commission* v. *Landon* (249 U.S. 236, 245), the Court held that although the piping of natural gas from state to state, and its delivery to independent local gas companies, is interstate commerce, its retailing and delivery by the local companies to their consumers is wholly intrastate commerce and not a continuation of interstate commerce, even though the mains of the local companies are permanently connected to those of their vendors.

As Petitioner is a distributing company which does not itself transmit energy interstate, the situation here is like that discussed in *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 308, in which the Court, speaking of the transportation of gas in a pipe line across a state line and delivery to distributing companies which then sold and delivered it to local customers, said: "With the delivery of the gas to the distributing companies, however, the interstate movement ends." In that case the Court also said (p. 309): "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; . . ."

See also *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, 471–2; *Illinois Gas Co.* v. *Public Service Co.*, 314 U.S. 498, 504.

The situation here is also similar to that presented in such cases as *Lone Star Gas Co.* v. *Texas*, 304 U.S. 224; *South Carolina Power Co.* v. *South Carolina Tax Commission*, 52 F. 2d 515 (E.D. S.C. 1931), aff'd 286 U.S. 525; 60 F. 2d 528, aff'd *sub nomine Broad River Power Co.* v.

Query, 288 U.S. 178; *Banker Brothers Co.* v. *Pennsylvania*, 222 U.S. 210. See also *Southern Gas Corp.* v. *Alabama*, 301 U.S. 148, 154–155.

The companies which contracted to supply those loads of Petitioner which were connected with the C.P. lines (including the Bristol district) have at all times been able to obtain the necessary supply from generating plants located in Connecticut. (R. 949–953, 969–972)

Consequently, it is clear that the State Commission had jurisdiction over those contracts and over all of the facilities of Petitioner in those areas. *Peoples Gas Co.* v. *Pub. Serv. Com.*, 270 U.S. 550;* Connecticut G. S. Rev. of 1930, Section 3599.**

---

* Although some of the language in this case was subsequently disapproved in *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, 472, the later case did not question the power of the State Commission over the contracts involved.

** In this connection attention is called to Section 1414(c), Cumulative Supplement to General Statutes of Connecticut. This Act, which was approved and became effective on May 29, 1935, as Chapter 191 of the Public Acts, 1935, states that its general purposes "are to assure to the State of Connecticut its full power to regulate its public service corporations", etc.

Section 6 of this Chapter [Cumulative Supplement (1935) 1414(c), cl. f, p. 592] contains the following provision:

> ". . . No gas, electric or water company, or holding company, or any official, board or commission purporting to act under any governmental authority other than that of this state or of its divisions, municipal corporations or courts, shall interfere with or attempt to interfere with or exercise authority or control over any gas, electric or water company incorporated by this state and engaged in the business of supplying service within this state, or with or over any holding company incorporated by this state and doing the principal part of its business within this state, without having first obtained the approval of the commission, except as the United States may properly regulate actual transactions in interstate commerce. Any action contrary to the provisions of this section shall be voidable on order of the commission."

As appears from the language of the Act itself and its legislative history, Congress intended to preserve jurisdiction of the state over such contracts and such facilities and not to bestow jurisdiction over the contracts or the facilities upon the Federal Power Commission.

In the *Jersey Central case, supra,* the Court was dealing with a situation where it could be said (in view of the prior decisions of the Court that a sale at wholesale of electric energy which later crosses state lines is a transaction "in interstate commerce") that a transmission and sale at wholesale within the state, with *subsequent* resale at wholesale and transmission out of the state, was a "*transmission* in interstate commerce." Thus, the Court referred to the cases of *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (273 U.S. 83) and *Illinois Gas Co.* v. *Public Service Co.* (314 U.S. 498), both of which involved the sale of interstate electric energy or gas *at wholesale,* as follows:

> "Without this separation from the movement across the New Jersey-New York line, the transmission by Jersey Central would fall within the definition of commerce declared by two former decisions of this Court.
>
> "In *Public Utilities Commission* v. *Attleboro Steam Co.,* 273 U.S. 83, 86, this Court held *in interstate commerce* the sale of locally produced electric current at the state boundary with knowledge that the buyer would utilize the energy extrastate. The passage of custody and title at the line was held immaterial. We see no distinction between a sale at or before reaching the state line." (*Jersey Central Co.* v. *Federal Power Commission,* 319 U.S. 61, 69).

Such reasoning can have no application to the present situation. Petitioner here is a local distributing company, engaged in a business which does not constitute "any part of interstate commerce," either in the sale of energy

at retail for local consumption or in the delivery or distribution of such energy from the point of reception within the State to the local consumers. Under the Federal Power Act, Petitioner's rates to consumers are subject to exclusive regulation by the State of Connecticut and it makes no sales of energy which would be subject to the jurisdiction of the Commission. No Federal purpose expressed in or intended by the Act would be served by placing such a local distributing company or any of its facilities under the jurisdiction of the Commission.

The phrase "transmission of electric energy in intrastate commerce" is not defined in the Act. However section 201 (c) provides as follows:

> "(c) For the purpose of this Part, electric energy *shall be held* to be transmitted in interstate commerce if *transmitted from* a state *and consumed at any point outside thereof;* but only insofar as such transmission takes place within the United States."

If this subsection were to be construed so as to stamp as facilities subject to the jurisdiction of the Commission *all* of the electrical facilities for the conveyance of electric energy from the point of generation in one state to the point of consumption in another state, then, of course, the Court below would be right, and all facilities, including those "used in local distribution"—down to the electric bulb in a housewife's kitchen—would be subject to the jurisdiction of the Commission.

We submit that, in view of the background and purposes of the Act, it cannot be said that Congress intended to depart from the concepts of "interstate commerce" laid down in the prior decisions of this Court, so as to include in the phrase "facilities for the transmission of electric energy in interstate commerce," the facilities of a local distributing

company used to receive and deliver energy at retail for local consumption within the state.

C. "FACILITIES USED IN LOCAL DISTRIBUTION" ARE EXEMPT FROM THE JURISDICTION OF THE COMMISSION, AND ALL THE FACILITIES OF PETITIONER AT BRISTOL ARE "FACILITIES USED IN LOCAL DISTRIBUTION."

We contend that whether or not any facilities of Petitioner at Bristol are facilities "for transmission of electric energy in interstate commerce", they are "used in local distribution" and are therefore exempt from the jurisdiction of the Commission because of the provision of Section 201 (b) that the Commission "shall not have jurisdiction, except as specifically provided in this Part and the Part next following, . . . over facilities used in local distribution."

1. Facilities Used in Local Distribution Are Exempt from the Jurisdiction of the Commission.

The Commission seems to have recognized in its opinion that certain facilities would be exempt under the language of the statute quoted above. This is apparent from the discussion in its opinion (R. 75–78) and the fact that it determined that certain facilities in each of the three areas connected with the C.P. lines were "used for transmission of electric energy . . . as distinguished from local distribution thereof." See paragraphs (10), (14), and (18) of the findings. (R. 66-69)

The Court below, however, held that Petitioner's contention that jurisdiction over accounts and the like could not be based solely upon facilities used in local distribution was unsound, and that the language of the Act quoted above did not operate as an exemption, but was "intended to make it clear that this jurisdiction extends even to local facilities where the Act provides for their regulation, as it does in

the case of accounting practices", and went on to say, "Therefore, whether or not the facilities by which petitioner distributes energy from Massachusetts should be classified as 'local' is not relevant to this case." (R. 1174–1175)

The Court admitted that the construction for which Petitioner contended was a "grammatical possibility", but based its conclusions upon considerations which, we submit, totally lost sight of the structure of the Act and its legislative history.

The provision for "accounting practices", on which the Court relied, cannot of itself submit facilities of a company or its accounts to the jurisdiction of the Commission. This provision appears in Section 301 of Part III. But in determining whether the Commission has any jurisdiction over a company, Part III does not control, inasmuch as Section 201(e) in Part II provides:

> "The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under *this* Part."

Thus it is clear that Petitioner is not a "public utility" subject to the jurisdiction of the Commission solely because facilities used in local distribution may be governed by the accounting requirements applicable to a "public utility".

The matter is definitely and clearly summarized in the following extract from the opinion in *Jersey Central Power & L. Co.* v. *Federal Power Commission*, 129 F. 2d 183, 194:

> "As we have said Section 201(a) of the Act states explicitly that the federal regulation proposed by the Act is intended 'to extend only to those matters which are not subject to regulation by the States', and that Section 201(b) says with equal clarity that *the Commission 'shall not have jurisdiction* . . . over facili-

ties used for the generation of electric energy or *over facilities used in local distribution* or only for the transmission of electric energy in intrastate commerce, ...' Generation of electricity, *its local distribution* or its transmission in intrastate commerce are not within the purview of the Act or the jurisdiction of the Commission."

The legislative history of the Act demonstrates clearly that Congress did not intend to extend Federal jurisdiction to all facilities connected to "parts of a system of power transmission situated in more than one state" (from which the original bill excepted facilities for "retail distribution"),* that continual efforts were made to narrow the basis of jurisdiction originally proposed, and that the ultimate intention was to exclude "facilities used in local distribution" from the categories of facilities subjecting a company to the general jurisdiction of the Commission.

The provision for jurisdiction over facilities in Section 201(a) of the Bill as reported to the Senate by the Senate Committee (in the Bill designated S2796) and in the Bill as passed the Senate was in the form set forth on page 28, *supra*, and specifically *excepted* from the jurisdiction of the Commission "facilities used in local distribution".

The House Committee on Interstate and Foreign Commerce rewrote certain provisions of the Bill and reported it to the House (S. 2796 with amendments, Report No. 1318, House of Representatives, 74th Congress, 1st Session). As so reported, the clause applying to "facilities used in local distribution" was the same as in the Act finally passed, except that it did not contain the words "except as specifically provided in this Part and the Part next following." The House enacted the clause as reported.

---

*S. 1725, 74th Cong. 1st Sess., February 6, 1935.

It is clear that the House did not intend to confer jurisdiction of the Commission over a company because of ownership of facilities used in local distribution. The Report of the House Committee contained the following language (p. 27):

> "As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State."

Owing to the differences between the bills passed by the two Houses, the matter was referred to conferees.

They inserted the phrase "except as specifically provided in this Part and the Part next following." This is the first time this phrase appears, and the Report of the House conferees accompanying the Conference Report (74th Congress, 1st Session, House Report No. 1903, p. 74) asserts that it is merely "a clarifying phrase added to remove any doubt as to the Commission's jurisdiction over facilities used for the generation and local distribution of electric energy to the extent provided in *other* sections of this part and the part next following." In the light of this statement and the fact that there was no dispute between the House and the Senate as to the provision regarding local distribution, it is clear that this clause was not intended to enlarge the basis of general jurisdiction of the Commission as previously limited.

As we have pointed out above, in determining the general jurisdiction of the Commission the Part next following, *i.e.*, Part III (in which the accounting provisions appear) must be disregarded.

Consequently it is manifest that the reasoning of the Court below was fallacious. The Commission has no jurisdiction over the accounts of a company unless it is a "public

utility." Whether a company is a "public utility" depends upon whether the Commission has jurisdiction over "facilities" which it owns or operates. To say that the Commission has jurisdiction over facilities because it may regulate *accounts* for such facilities, which it may do only *if* the company *is* a "public utility," begs the question and tests the status of the company solely by reference to the results which would flow from that status if occupied by the company.

Indeed, the Court below does not seem to have considered the totality of the effect of its determination of Petitioner's status, with respect to the entire scope of the Commission's regulatory power over one who is a "public utility". The Court speaks as though all that were involved in the determination of status is the matter of accounting practices. Thus, referring to the construction urged by Petitioner, the Court said (R. 1174):

> "Such a construction is a grammatical possibility. However, it contradicts the broad purpose of the Act to correct abuses of write-ups, inflation of accounts and similar practices which have on occasion been found in the utility industry. . . . It would encourage the setting up of unnecessarily complicated accounting systems between the owners of the segments of the artificially divided power system, which the Act is designed to eliminate."

This case does not involve an "artificially divided power system." Petitioner here is not and never was affiliated in any way with the Connecticut Power Company, from which it purchases electric energy. It is a wholly independent distributing company, purchasing energy at arm's length from a stranger.

If the Federal Power Act leaves the door open to hypothetical corporate manipulations like those described in the

opinion of the Court below, it does not follow that regulation may be evaded. The state commissions have jurisdictions over companies operating local distribution systems, and that jurisdiction was intended to be preserved to them by the Federal Power Act.

If opportunity exists for corporate reorganizations which will divide an "interstate company" into segments *i.e.*, two companies, one conducting the business of transmission and selling energy at wholesale, and the other conducting the business of local retail distribution, regulation may be *divided* but it *exists* and presumably will be exercised. If such a situation requires correction, there are means of correcting it other than misconstruing the plain provisions of the Federal Power Act.

The view of the Court below would completely nullify the "but" clause. Certainly, if no electric energy from another state flows through the facilities enumerated in the "but" clause, the exemptions contained therein would be wholly superfluous. That the Congress intended the exemptions to apply even though such energy flows through the facilities is plain. For example, there would be no point in exempting "facilities for the transmission of electric energy consumed wholly by the transmitter," unless the clause applies where the energy is produced in one state and consumed in another. Nevertheless, under the construction applied by the Court below, if electric energy from another state flows through any of the facilities enumerated, they would automatically become facilities for "transmitting electric energy in interstate commerce" and the owner or operator thereof would be a "public utility" under the Act.

We submit that Congress intended no such test of the Commission's jurisdiction, but that it clearly intended to exclude from jurisdiction the facilities which it specified as not being under the jurisdiction of the Commission.

2. The Exemption of "Facilities Used in Local Distribution" Should Be Construed to Exempt All the Facilities of a Local Distributing Company Beyond the Point of Delivery of the Electric Energy to It.

The question under the Act is not whether facilities are to be characterized as "transmission" or "distribution" facilities. These are terms upon which experts may differ in their application to particular circumstances. The question under the statute is merely whether the facilities (however they may be classified in engineering practice) are actually "used in local distribution".

The discussion in the opinion of the Commission and its findings show that the Commission took too narrow a view of the scope of the exemption of facilities "used in local distribution", which it confined to facilities in the system beyond the point where "the process of subdividing the energy to serve ultimate customers, which [it said] is the characteristic of 'local distribution', is begun." (R. 75) Thus it excluded from the excepted category various facilities of Petitioner beyond the point where it received the electric energy from the Connecticut Power Company, and classified as facilities not used for local distribution not only certain lines between Torrington and Winsted and in the East Hampton area, but also the substations in those areas which lowered the voltage, and also the facilities in the substation in the heart of Bristol. (R. 66-69)

Petitioner contended there and now contends that as a matter of law the exception must be construed as embracing all the facilities owned by it beyond the point of delivery of the electric energy to it as a distributing company.

Whatever may be the power of Congress to place under the jurisdiction of a Federal agency facilities such as those under discussion, it is clear that Congress in the Act did not attempt to include—indeed it expressly excluded—all facil-

ities actually "used in local distribution". The word "used" indicates that if a facility has a use in connection with local distribution it is to be exempted even though it is also used for transmission.

In this connection, the legislative history of the Act is illuminating.

In the bill as initially presented to the Senate by Senator Wheeler (S. 1725, 74th Congress, 1st Session) Sec. 201(b) read as follows:

> "The Commission shall have jurisdiction over all facilities for such transmission, sale and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities for the retail distribution of electric energy, or for the production or transmission of energy solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale."

The main objections to the bill were that it encroached upon the ambit of State regulation. The Senate Committee submitted a substitute bill in which the comparable phrase in the exception was changed to read: "facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for use of the producer or transmitter." This change enlarged and expanded the exception. It was no longer limited to facilities for distribution at retail but included facilities engaged in intrastate commerce and local distribution, whether the transactions involved were at retail or not. The language in the bill as finally passed, "facilities used in local distribution", is broader than the similar exceptions in earlier drafts.

It is obvious that any facility in an electric system

through which electric energy flows is used for transmission, and any attempt to classify a particular facility as one for transmission or one for local distribution must depend to considerable extent upon the emphasis which one wishes to place upon its functions.

The conception of the Commission counsel as to local distribution is so narrow that if the term, as used in the Federal Power Act, were construed to conform with their characterization, it would be largely or wholly ineffective. It is hard to conceive of any company serving a community at retail which would not have facilities for transmission as distinguished from facilities for local distribution, as those terms are used by them. In specifically exempting jurisdiction "over facilities used in local distribution" Congress intended to exempt companies which did merely a local business. The Bristol district of Petitioner under discussion is entitled to precisely the same treatment as if it were served by a single separate company.

At Bristol Petitioner's facilities, which the opinion of the Commission classified as used for transmission purposes, are all in a substation in the heart of Bristol, covering a small area. Its specific function was to change the energy from transmission voltage to distribution voltage. (R. 838–843)

That such facilities are being used for local distribution has been recognized by the Federal Power Commission itself in respect to substations in its regulations for accounting, and it has also been adopted in the Uniform System of Accounts for Electric Utilities of the National Association of Railroad and Utilities Commissioners and by the Public Utilities Commission of the State of Connecticut. In rules of all of these appears the following (Ex. 90, Par. 16; Ex. 91, Pars. 14 and 15. See also, Par. 16, p. 52, of Federal Power Commission Uniform System of Accounts, effective January 1, 1937):

"Stations which change the energy from transmission to distribution voltage shall be classified as distribution stations."

Although Commission counsel have contended that definitions relating to accounting have no application to the matter in question, we submit that they are of significance as indicating how regulatory bodies do classify substations, and that the classification by the Federal Power Commission itself is of especial weight. It is unthinkable that the Commission would have made such a classification for accounting purposes if it believed it to be untenable. The fact that other regulatory bodies have treated such substations in the same manner is ample evidence of the fact that there is justification for so regarding them.

3. All of the Facilities of Petitioner at Bristol Were Beyond the Point of Delivery of the Electric Energy to It at Its Distribution Substation.

This is undisputed. See finding (18), R. 69; R. 838–839.

The facilities at the sub-station in Bristol are described in detail by the witness Hughes, who designed the sub-station. He was assigned the task of designing a complete distribution system to replace an inadequate one which existed when Petitioner purchased the Bristol property about 1926. He testified that the power purchased comes from the 66,000 volt lines of the Connecticut Power Company. These lines are tapped by a line about a mile and a half in length, consisting of steel towers, which run to Petitioner's sub-station at Bristol. The tap line and the switching facilities are owned by the Connecticut Power Company. Petitioner owns facilities located in its sub-station, which is surrounded by a wire fence, starting with an outdoor steel structure to which the lines of the Connecticut Power Company run. All of the energy purchased is immediately distributed locally. (R. 838–844)

Consequently it is unnecessary to consider the evidence as to the specific facilities in the Bristol substation in order to come to the conclusion that they were all "used in local distribution."

D. THE COURT BELOW ERRED IN CONCLUDING THAT PETITIONER'S BUSINESS WAS "ESSENTIALLY INTERSTATE" BY REASON OF PETITIONER'S OPERATIONS PRIOR TO THE EFFECTIVE DATE OF THE ACT.

The decision of the Court seems to be based largely upon its conclusion that the system of Petitioner was "essentially interstate" and not "normally intrastate". We submit that in coming to this conclusion the Court committed fundamental errors.

The Court stresses the fact that Petitioner terminated its membership in the Connecticut Valley Power Exchange, an association for the interchange of electric energy between Connecticut and other States, before the effective date of the amendment to the Act, which produced Sec. 201. The Court states that the character of Petitioner's system can be judged from its activities and discontinuance of activities before the amendment to the Act went into effect. The reasoning of the Court is subject to several criticisms.

The first criticism of the reasoning of the Court is that it relies largely on what Petitioner did before the Act took effect. But as this Court said in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 72, 73, the Commission's power extends only over facilities "which transmit energy actually moving in interstate commerce" and "the determinative fact is the ownership of facilities used in transmission."

Obviously, the Commission could not acquire jurisdiction over any of Petitioner's facilities unless they were facilities over which the energy actually moved in inter-

state commerce after the effective date of the Act. We submit that its status must be determined by conditions which actually existed at the time as of which jurisdiction is asserted, not by what had happened prior to that time—and certainly not by what happened prior to the effective date of the Act.

The evidence does not show what part of the business of Petitioner was involved in its participation in the Connecticut Valley Power Exchange. As a matter of fact, it was a comparatively unimportant part of the business of Petitioner. In our view of the case, this was immaterial. Certainly it was improper for the Court to assume, in the absence of such evidence, that its participation in this Exchange rendered the business essentially an interstate business. As we have pointed out elsewhere, Petitioner had an extensive system by which it distributed energy to 107 towns, cities and boroughs in Connecticut, and undoubtedly most of the energy which it generated was used in the State. As far as we know, no study was ever made to determine how much, if any, energy from outside of the State could be regarded as coming to Petitioner's facilities prior to the effective date of the amendment.

There was no evidence that any of the facilities of Petitioner was constructed with a view to receiving energy from, or sending energy to, points outside of the State; and the fact is that none of the facilities was constructed with either of these aims in view. (See R. 842, regarding Bristol)

II.

THE COURT BELOW ERRED IN REFUSING TO WEIGH THE TESTIMONY AS TO JURISDICTIONAL FACTS.

Petitioner contended in the Court below that the findings of the Commission to the effect that Petitioner purchased electric energy for three areas connected with C.P. lines which "regularly, frequently and over substantial periods of time" included electric energy in substantial amounts transmitted from Massachusetts could not stand; and that the Court was under the duty of weighing the evidence and making its own independent determination of that jurisdictional fact. (R. 1180–1183) The Court, however, considered that the question was merely whether there was substantial evidence. (R. 1170)

As facilities are not subject to the jurisdiction of the Commission unless they transmit "energy actually moving in interstate commerce", it follows that unless it is proved that energy from outside of the state did reach Petitioner's facilities they are not subject to the jurisdiction of the Commission.

Section 313(b) of the Federal Power Act provides, "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

In this connection it should be borne in mind that it is expressly stipulated in Section 313(b) of the Federal Power Act, which provides for review by the Courts, that upon the filing of the transcript therein, "such court shall have exclusive jurisdiction to affirm, modify or set aside such order in whole or in part", and that the statute contains no other provision for challenging the order of the Commission or any finding of fact upon which it is based.

The statute should not be construed in such a way as to raise grave doubt as to its constitutionality. If the statute were construed to require the reviewing Court merely to

ascertain whether there was some substantial evidence to support the findings as to *jurisdictional* facts it would be unconstitutional (1) in that it would deprive Petitioner of property without due process of law in violation of the provisions of Article V of the Amendments to the Constitution of the United States; (2) that it would curtail the powers of the Judiciary in violation of the provisions of Article III, Sec. 2 of the Constitution; and (3) that it would confer on the United States a power reserved to the State of Connecticut in violation of the provisions of Article X of the Amendments. *Crowell* v. *Benson*, 285 U.S. 22; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51–52; *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 364; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C.C.A. 5th), cert. den. 299 U.S. 559; *National Labor Relations Board* v. *Cherry Cotton Mills*, 98 F. 2d 444, 446 (C.C.A. 5th). See also *United States* v. *Appalachian Electric Power Co.*, 107 F. 2d 769, 791 (C.C.A. 4th), reversed 311 U.S. 377 (see pp. 403, 404); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287.

The evidence in regard to the jurisdictional question as to whether electric energy transmitted from Massachusetts reaches the facilities of Petitioner is discussed in Appendix B, pp. 68 to 79, *infra*.

III.

PETITIONER WAS NOT A "PUBLIC UTILITY" UNDER THE PROVISIONS OF THE FEDERAL POWER ACT AT ANY TIME SINCE THE EFFECTIVE DATE OF THE 1935 AMENDMENTS TO THE ACT.

A. THE FACILITIES OWNED AND OPERATED BY PETITIONER FOR THE SUPPLY OF ITS EAST HAMPTON DISTRICT, UNTIL JUNE 30, 1939, AND ITS TORRINGTON-WINSTED DISTRICTS, UNTIL JUNE 17, 1941, WERE NOT SUBJECT TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION.

All that we have said with reference to the present situation at Bristol (under Point I, *supra*) applies with equal force to the situation which existed in the past with reference to the East Hampton and Torrington-Winsted districts.

The mere fact that Petitioner in these districts received electric energy at one point within the state (but not at the state line) and conveyed it to other points in the state for delivery to local consumers does not bring the facilities used for that purpose within the jurisdiction of the Commission.

The situation in regard to the facilities in these districts is explained on pp. 6–10, *supra*.

In these districts, as in the Bristol district, the receipt of the electric energy from Petitioner's vendors terminated the interstate journey of the energy. Moreover, all of the facilities in these two districts come within the exemption of "facilities used in local distribution".

B. THE FACILITIES OWNED AND OPERATED BY PETITIONER UNTIL FEBRUARY 28, 1941, FOR THE TRANSMISSION AND SALE OF ELECTRIC ENERGY TO THE BOROUGH OF GROTON, A MUNICIPAL CORPORATION, WERE NOT SUBJECT TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION.

Petitioner transmitted and sold electric energy at wholesale to the Borough of Groton, a municipal corporation in Connecticut. This Borough has the charter right to carry on the business of distributing power within certain limits. (Finding, R. 64; see also R. 168, 169, 171–173, 180; Ex. 77, R. 1148)

After delivery of the energy to the Borough of Groton, some of it was distributed to numerous customers of the Borough located on its distribution system in Connecticut. Some of the rest was transformed from 33,000 volts, at which it was delivered, to 6600 volts at a substation owned by the Borough and then at another substation owned by the Borough some of it was transformed to 2300 volts. Part of the energy going to this point was distributed to local customers in Connecticut and the rest went to a substation connected with cables going to Fishers Island, New York. None of the facilities between the substation first mentioned and Fishers Island was owned by Petitioner in recent years. (R. 100–101, 180–182, 199–203, 206, 532–533)

The energy purchased by the Fishers Island Company from the Borough amounted to about one-third of the total amount of energy purchased by the Borough from Petitioner, but to only about 1/5 of 1% of all of the energy supplied by Petitioner in each year to all of its customers. (R. 216, 834–836)

The energy was purchased by the Borough of Groton from Petitioner under contracts which made no mention of sale of the energy by the Borough to the Fishers Island Company, but Petitioner knew that some of the energy was

being supplied by the Borough to the Fishers Island Company. (R. 93-107, 193)

In February, 1941, prior to the hearing before the Commission, connections were cut and facilities were dismantled so that transmission to Fishers Island was no longer possible. (R. 196-197, 209-215, 608)

We submit that the sales to Groton and the facilities used in connection therewith did not submit Petitioner to jurisdiction of the Commission for two distinct reasons.

I. Under the Provisions of the Federal Power Act, the Federal Power Commission Did Not Have Jurisdiction Over Facilities of Petitioner Used in Connection with the Sale of Electric Energy to a Municipal Corporation.

Section 201(b) of the Act confers jurisdiction over "the sale of electric energy at wholesale in interstate commerce . . .", and Section 201(d) defines the term "sale of electric energy at wholesale" as meaning "a sale of electric energy to any *person* for resale". Subsection (4) of Section 3 defines "person" as "an individual or a corporation", and subsection (3) of Section 3 defines "corporation" as not including "municipalities as hereinafter defined." Subsection (7) of Section 3 defines municipality as a "political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

Moreover, Section 201(f) contains the following:

> "No provision in this part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State . . . unless such provision makes specific reference thereto."

The Borough of Groton is a municipal corporation and as such, of course, is a political subdivision of a state. It has authority to distribute power.

The words of the statute are clear. Accordingly, we submit that the sales to Groton are not sales of the character which submits facilities used in connection therewith to the jurisdiction of the Commission.

The cases cited in the opinion of the Commission (R. 78) state that it must be contemplated that a municipality has the right to have the Commission supervise its contracts with companies selling to it at wholesale, in view of the provisions of Sections 306 and 313, which give municipalities the right to complain to the Commission, to apply for a rehearing, and to obtain a review in court. The reasoning is that the only sales over which the Commission has jurisdiction are sales at wholesale and consequently the only sale in which a municipality would be seriously interested would be a sale direct to the municipality. We submit that further consideration of the Act will demonstrate that this is not so.

Thus the provisions in Sections 306 and 313 give rights to "any person, State, municipality or State commission." Obviously, the rights of a state commission to be heard are not predicated upon or limited to sales to a state commission, because such sales could not have been contemplated. It seems manifest that official bodies, such as municipalities, municipal commissions, and state commissions, are given certain rights in respect of transactions to which they are not parties but in which they may feel they should represent some public interest. A municipality might desire to institute a complaint or participate in a controversy involving wholesale rates to a company serving its inhabitants.

It is also significant that Sections 306 and 313 apply to all parts of the Act. In this connection it is noteworthy that licenses to construct dams and the like may be issued to municipalities under Section 4(e), and that numerous other provisions of the Act are applicable to municipalities.

Among these are 4(f), 7(a), 10(c), 10(e), 14, 19, 23(b), 301, 302, and 304. For Code references see U.S.C. Title 16, § 797(f); 800(a); 803(c); 803(e); 807; 812; 817; 825; 825(a); 825c.)

It is consequently evident that there is ample scope for applying the provisions of Sections 306 and 313 to a municipality without construing them as overriding the language of Sections 201(d) and (f).

The opinion of the Commission also states that as this contention "is based solely upon the definitions of 'sale at wholesale', it obviously cannot apply to 'transmission in interstate commerce', even though such transmission is to a municipality." (R. 78)

But we submit that under no reasonable interpretation would the statute exclude the facilities of a company from the jurisdiction of the Commission because related to a sale to a municipality and at the same time nullify the exclusion by subjecting the seller to jurisdiction because of the transmission connected with such sales.

Obviously the sales from the Borough to Fishers Island Company were beyond the jurisdiction of the Commission, and it possessed no authority to regulate the rates charged by the Borough upon such sales. The Commission itself has said:

> "Section 201(f) was expressly inserted in Part II of the Act (and to apply to that part only) to inhibit the regulation of, among other things, the activities of a municipality or other state agency engaging in the transmission or sale at wholesale of electric energy in interstate commerce." (*Re Otter Tail Power Co.*, 33 P.U.R. (N.S.) 257, 261.)

The Borough of Groton, therefore, could charge any rate which it could persuade the Fishers Island Company to pay, without let or hindrance by the Federal Power Commission; and the retail rates charged by the Fishers Island Company

were subject to exclusive regulation by the New York Public Service Commission. In such circumstances, no "incidence of federal regulation" occurred, and it cannot be said that without general jurisdiction of the Commission over Petitioner "federal rate control would be substantially impaired, if not rendered futile." (*Cf. Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 72.)

It seems clear that Congress intended to deny the Commission jurisdiction over anything based upon purchases by a municipality or sales by a municipality. If the transaction with the municipality is beyond the jurisdiction of the Commission, there is no reason for it to have jurisdiction over facilities merely because they were connected with such a sale.

2. In any Event the Resale of Energy by the Borough of Groton to Fishers Island Should be Disregarded Under the Doctrine of de minimis non curat lex.

The territory served directly by Petitioner covers a substantial part of the State of Connecticut. It serves electric energy in 107 towns, cities, and boroughs, which have a total population of abut 660,000, not including about 130,000 served by other Connecticut utilities purchasing substantially all of their electrical requirements from Petitioner. (R. 86-87)

The amount of energy which was transmitted to Fishers Island was only about 1/5 of 1% of all the energy generated and received by Petitioner. But if the sales to Groton or the transmission facilities used in them are held subject to the jurisdiction of the Commission, the result is not merely to submit these particular sales and facilities to the jurisdiction of the Commission, but, as pointed out above to submit a very large part of the activities of Petitioner's entire business to the jurisdiction of the Commission. Among other things this will require compilation of an in-

ventory of all of its property with a statement of the original cost thereof, a tremendous undertaking which it is estimated will involve an expense of about $400,000.

It is incredible that Congress intended to give the Commission such jurisdiction over a company because it had facilities which were used in connection with such an infinitesimal part of its business. This Court in the *Jersey Central* case appears to have recognized that the *de minimis* rule might be applicable to such a situation. (Footnote 4 of the majority opinion.)

The Court below also seemed to recognize that the *de minimis* rule might be applicable to such a situation, but it refused to apply it because it concluded that the history of Petitioner's operations removed all doubt as to its "essentially interstate character", and indicated that the business of Petitioner was not normally an intrastate business.

This, we submit, reveals a complete misunderstanding of the nature of Petitioner's business. Although prior to the passage of the Act some of its generating plants were connected with lines which transmitted energy to Massachusetts, the production of energy for use in Massachusetts was only a small part of the business of Petitioner, which generated large amounts of energy and transmitted them from its generating plants to about 100 towns, cities, and boroughs in Connecticut which it served with electricity. Before the Act went into effect, the connection of its generating plants with the lines going to Massachusetts was severed, and after that if Petitioner was engaged in interstate business at all it was only because of the extremely small amount of energy supplied indirectly to Fishers Island, New York, and because of the fact that some of the energy which it received from the Connecticut Power Company happened to come from sources in Massachusetts.

although Petitioner contracted for no energy from such sources.*

IV.

PETITIONER IS NOT NOW A PUBLIC UTILITY WITHIN THE MEANING OF THE FEDERAL POWER ACT, AND NO USEFUL PURPOSE WOULD BE SERVED IN REQUIRING IT TO COMPLY WITH ORDERS APPLICABLE TO PUBLIC UTILITIES EVEN IF IT HAS BEEN SUCH A PUBLIC UTILITY AT ANY TIME.

Even if it should be held that Petitioner has engaged in some activities or has had some facilities which rendered it a public utility, it does not follow that it is still subject to the jurisdiction of the Commission. There have been several changes which might change its status.

Thus, there is no possibility that Petitioner is now a public utility because of its connections with the Borough of *Groton* or its transactions there. For, as indicated in findings of the Commission, none of the energy sold to Groton has been transmitted outside of Connecticut since February, 1941. (R. 64) The cables connecting Fishers Island with the Borough of Groton have been severed and other facilities over which the energy flowed to Fishers Island have been dismantled. (R. 196–197, 209–215, 608)

Petitioner's facilities in the *East Hampton* area have not been connected with the C.P. lines since July 1, 1939, but since that time have been supplied entirely by energy generated in Petitioner's own plants in Connecticut. (R. 66 (9))

---

*As indicated above, Petitioner had no occasion to determine whether any electric energy was received from Massachusetts, and we contend that it has not been shown that it did receive such energy after the Act went into effect in 1935.

Petitioner's facilities at *Torrington* have not been connected with the C.P. lines since June, 1941.*

Consequently, unless it should be held that some of Petitioner's facilities at *Bristol* render it subject to jurisdiction of the Federal Power Commission under the Act, there is no ground for any contention whatever that Petitioner is a "public utility".

There is nothing in the Act which indicates that if a company has once been a "public utility" it shall continue to be treated as such after the activities which have rendered it such have ceased.

The Federal Power Commission itself appears to have recognized the fact that its jurisdiction under Part II of the Act is dependent upon the continuation of interstate activities. *In the matter of the Twin State Gas and Electric Company,* 33 P.U.R. (N.S.) 39.

Conceivably it might be contended that if Petitioner was a public utility, but had ceased to be such, it should nevertheless comply with orders which were applicable to it during the time when it was a public utility.

The orders applicable to public utilities which are mentioned in the order to show cause relate to accounting, and the like. We submit that if Petitioner was a public utility but has ceased to be such, it would serve no useful purpose now to compel Petitioner to make up accounts for past

---

* Petitioner arranged to connect its own generating plants with its Torrington-Winsted line. For years it has owned the right of way from Waterbury to Torrington. At the time of the hearing it was anticipated that within a comparatively few weeks the only source of supply for the Torrington-Winsted area would be Petitioner's own plants, and that, as soon as the work previously started should have been completed, the contract with the Torrington Company would be terminated pursuant to agreement of the parties and under no circumstances would this district receive any supply from C.P. lines 1 and 2. (R. 136–143) The work was completed in October, 1941, and since that time the sole source of supply of this area has been Petitioner's own plants.

years in the way required by the Commission. Obviously, this would involve a great deal of time and expense, and no practical benefit would result therefrom.

Similarly it would be a mere waste of time to require Petitioner to compile and furnish information in regard to the original cost of all of its facilities, if none of them is now subject to the jurisdiction of the Commission.

V.

CONCLUSION.

Petitioner has not been, since the enactment of the 1935 Amendments to the Federal Power Act, and is not now, a "public utility" within the meaning of the Act, nor subject to regulation by the Commission in respect to accounting or otherwise.

The judgment of the Court below should be reversed and set aside.

Respectfully submitted,

CLAUDE R. BRANCH,
EDWARD M. DAY,
LAWRENCE A. HOWARD,
GAY H. BROWN,
Attorneys for Petitioner.

CHOATE, HALL & STEWART,
DAY, BERRY & HOWARD,
BROWN, RYAN & KENNY,
Of Counsel.

NOVEMBER, 1944.

APPENDIX A.

STATUTES INVOLVED.

FEDERAL POWER ACT.

Act of August 21, 1935, C. 687, Title II (49 Stat. 838).

PART I—REGULATION OF THE DEVELOPMENT OF WATER POWER AND RESOURCES

SECTION 3.* The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * * * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

* * * * * * * * *

PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Declaration of Policy; Application of Part; Definitions.

SECTION 201. (a)** It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest,

---

* 49 Stat. 838, U.S.C. Title 16, § 796.

** 49 Stat. 847, U.S.C. Title 16, § 824(a).

and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b)* The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c)** For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d)*** The term "sale of electric energy at wholesale"

---

* 49 Stat. 847, U.S.C. Title 16, § 824(b).

** 49 Stat. 848, U.S.C. Title 16, § 824(c).

*** 49 Stat. 848, U.S.C. Title 16, § 824(d).

when used in this Part means a sale of electric energy to any person for resale.

(e)* The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f)** No provision in this Part shall apply to or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

• • • • • • • • • •

PART III—LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS.

Accounts, Records, and Memoranda.

SECTION 301. (a)*** Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with

---

* 49 Stat. 848, U.S.C. Title 16, § 824(e).

** 49 Stat. 848, U.S.C. Title 16, § 824(f).

*** 49 Stat. 854, U.S.C. Title 16, § 825(a).

respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

* * * * * * * * *

Rehearings; Court Review of Orders.

SECTION 313. (a)* Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any per-

---

* 49 Stat. 860, U.S.C. Title 16, § 825*l*(a).

son unless such person shall have made application to the Commission for a rehearing thereon.

(b)* Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

• • •

* 49 Stat. 860, U.S.C. Title 16, § 825*l*(b).

APPENDIX B.

THE FINDINGS OF THE COMMISSION TO THE EFFECT THAT PETITIONER PURCHASED ELECTRIC ENERGY FOR THE THREE DISTRICTS CONNECTED WITH THE C. P. LINES WHICH "REGULARLY, FREQUENTLY AND FOR SUBSTANTIAL PERIODS OF TIME INCLUDED ELECTRIC ENERGY IN SUBSTANTIAL AMOUNTS TRANSMITTED FROM MASSACHUSETTS" CANNOT STAND.

(1) CONTRACTS CALLED FOR A SUPPLY FOR THESE THREE DISTRICTS FROM GENERATING PLANTS IN CONNECTICUT, AND SINCE THE BILLING TO PETITIONER WAS BASED ON PRODUCTION COSTS AT A STEAM GENERATING PLANT IN HARTFORD, CONNECTICUT, PETITIONER HAD NO REASON TO CONCERN ITSELF WITH ANY POSSIBLE FLOW OF ENERGY FROM MASSACHUSETTS.

For the specific facts establishing these conclusions, with reference to the evidence proving them, see p. 9, *supra*.

(2) THE COMPANIES FROM WHICH PETITIONER PURCHASED ENERGY WERE AT ALL TIMES ABLE TO SUPPLY PETITIONER'S FULL REQUIREMENTS FOR THESE THREE DISTRICTS FROM GENERATING PLANTS IN CONNECTICUT CONNECTED WITH C.P. LINES 1 AND 2, AND AT NO TIME WERE THE COMBINED LOADS OF PETITIONER IN THESE DISTRICTS GREATER THAN THE AMOUNT GENERATED CONTEMPORANEOUSLY BY SUCH PLANTS.

The capacities of the steam plants of the Hartford Company which were connected with C.P. lines 1 and 2 were always 124,000 k.w. or more, that of the South Meadow plant alone now being 130,000 k.w. (R. 969–970) The generating capacity of the South Meadow plant in Hartford was at all times greater than the contemporaneous maximum demand on the Hartford's own system plus that on C.P. lines 1 and 2. (R. 971–972)

The maximum amount purchased at any time by Petitioner for its three areas under discussion was less than

20,000 k.w. (R. 952-953) At no time since January 1, 1937,* were the combined loads of these three areas of Petitioner on C.P. lines greater than the amount generated contemporaneously by generators located in Connecticut, connected with C.P. lines 1 and 2. (R. 949-953)

(3) ALL THE ESTABLISHED FACTS ARE CONSISTENT WITH THE CONCLUSION THAT ALL OF THE ELECTRIC ENERGY FURNISHED TO PETITIONER IN THESE THREE DISTRICTS WAS GENERATED IN CONNECTICUT.

The Court below seems to have misunderstood the evidence and our contentions in regard to the evidence.

Thus the opinion states that the statute "makes the test of whether such energy is actually transmitted between the two states the simple and practical one of reading a meter" (R. 1176), but the evidence demonstrated clearly that in the situation which obtained here the reading of a meter would not show the source of the energy.

The facilities of the Petitioner in question were at all times connected with generating plants in Connecticut which contemporaneously generated more than the combined loads of these three areas of the Petitioner. (R. 949-953) As the engineer of the Commission admitted, there were no meters which showed the source of the energy which reached the facilities of the Petitioner.** The gener-

---

* January 1, 1937, was taken as a starting point in view of the fact that counsel for the Commission indicated that they had no evidence upon which to base any contention in respect of these areas prior to January 1, 1937. January 1, 1937, is first date mentioned in the findings relating to these three areas. (R. 66-69)

** The following are extracts from the testimony of the Commission's engineer, Thomas (R. 601-603):

"Q. Now, I think that you testified in effect that there were instruments for determining the flow of energy and the rate of flow that you designated as watt-meters or watt-hour meters; is that correct? A. I remember stating that.

ating plants in Connecticut were nearer these loads of the Petitioner than were the generating plants in Massachusetts. (See R. 1113) In these circumstances we contend that, as distinguished experts testified, there was no established principle by which it could be shown that any energy from Massachusetts reached the facilities of the Petitioner. (R. 772–776, 864–865, 873)

We did not suggest, as the opinion implies, that there was any "distinction between electric current as measured on a meter and electric energy . . . within the contemplation of Congress when it passed the Act."

As the energy actually generated in Connecticut connected with the C.P. lines was at all times sufficient to supply the demands of Petitioner, there was no convincing

---

"Q. Such meters, of course, do not show the source of the energy, do they? A. Well, the meter itself doesn't have a marking on it to show where it came from. In Mr. Miller's case, the meter doesn't show red and blue or anything of that sort.

"Q. And of course there is not at Bristol or Winsted or any of the East Hampton District any instrument which shows the source of the energy that was received there at any time? A. No, not that you can determine from the reading on the instrument.

"Q. And as a matter of fact it is impossible by examining or by any other observation that you can make of energy at a particular point, to know where it is generated? A. I think that is correct.

* * *

"Q. Let me ask you a specific question. Let us assume that there is energy put on the CP line No. 1 from Falls Village, and there is also energy put on that line from Hartford. There is no physical observation or no reading of any meter on that line that would enable you to determine at any particular point what proportion of the energy came from one source and what from the other? A. Well, the instruments that are put on the line are only intended to read the total. So, of course—

"Q. And the— A. So, of course, they wouldn't indicate parts. They are not intended for that purpose."

evidence that any energy from Massachusetts ever went to Petitioner's facilities.

Electric energy is, of course, intangible, and has a complete lack of identifiable individuality. It was agreed by all of the experts that electrical energy loses its identity when put upon a conductor with energy from another source, and that, where several generators are connected with a system upon which there are several different loads, it is impossible by physical means to determine the origin of any energy supplied to a particular load. (R. 558, 601, 622, 772, 872) The two experts who testified for Petitioner, Slepian and Lewis, stated positively that in the situation which has obtained here there is no established principle by which energy in any load of Petitioner may be identified as to source and that, upon the undisputed facts it is impossible to prove by any method that any energy from Massachusetts reached the facilities of Petitioner. (R. 772–776, 864–865, 873) We submit that the conclusions of the Commission to the contrary are not proved.

The chief basis for the Commission's conclusion to the contrary was opinion evidence presented by two employees of the Commission, Miller and Thomas.

No opinion supporting the views of the Commission was expressed by any witness except these two.

Miller concluded that during certain hours on 21 days of which he made careful analyses and probably at numerous other times the loads of Petitioner at East Hampton, Bristol, and Winsted were supplied in whole or in part with energy generated outside of Connecticut. (R. 449–454, 470–471)

The foundation of his conclusions was the reading of watt-hour meters at the South Meadow substation of the Connecticut Power Company. These readings were not made for the purpose of tracing the source of supply to any load, and it does not appear that prior to Miller's

examination any effort had ever been made to identify the source of energy from them. He, however, used them as a basis for such a study. (Exs. 61 and 62, R. 414–415) He assumed that the transmission or flow of energy in an electric circuit is a traceable process; that the flow of energy must be in only one direction at any one time; and that from the reading of watt-hour meters (which showed the average product of voltage, current, and time) one can trace the flow of energy from its point of origin to its point of consumption. On these assumptions an attempt was made to trace the energy on the Hartford-Agawam line from Massachusetts to the South Meadow substation and thence to points on the C.P. lines. He also assumed that energy generated at Falls Village, Connecticut, at the other end of the C.P. line, could at a given time flow only in a direction which similar assumptions as to the readings of watt-hour meters near that end of the line indicated to him. (See R. 557–560, 569–571)

From cross-examination of Miller it was apparent that he himself did not have sufficient scientific knowledge of the principles upon which he acted to support them. Although he was trained as an electrical engineer and had held various positions which may have increased his scientific knowledge, during a considerable part of the time prior to his coming to the Federal Power Commission he had not been engaged in scientific work of any kind and the scientific work in which he had been engaged had not been such as to give him any particular qualifications as an expert as to the engineering aspects of the subject-matter of his studies. He had never made any such studies prior to the time when he came to the Commission in May, 1935. He had not either before or since coming to the Commission conducted any experiments or done anything else which enabled him to support his assumptions with anything more

than his flat statement that these principles were sound. (R. 559–560, 569–574)

Such support as there was for his assumptions came from the testimony of another member of the Commission's staff, Thomas, who evidently was presented as an expert qualified to express opinions in regard to the principles involved in Miller's study.

Thomas, upon cross-examination, admitted that Miller's conclusions were premised upon the assumption that there could not be a simultaneous flow of electrical energy in opposite directions past a given point in a conductor, and it is quite evident from analysis of the process of Miller's reasoning, as well as from the testimony of the experts called by Petitioner, that this assumption was the very keystone of Miller's studies. (R. 488–490, 559–560, 600) For if counter-flow of energy can occur, then it may be assumed that all the Massachusetts energy which reached the South Meadow substation in Hartford supplied the loads of the Hartford company in the vicinity of Hartford while Petitioner's loads were supplied by energy generated nearer them—i.e., at the South Meadow plant in Connecticut. (R. 772–774, 864, 872–873)

Thomas on direct examination stated that the impossibility of counter-flow was a "universally accepted hypothesis." (R. 491) This statement is sufficiently disproved by the fact that two eminent engineers, Dr. Joseph Slepian and Dr. W. A. Lewis, stated emphatically that this principle was not recognized among engineers as a basis for the conclusions which Thomas rested upon it. (R. 772–777, 864)

Slepian and Lewis testified that the simultaneous counter-flow of electric energy has been demonstrated "insofar as any flow can be demonstrated", and pointed out various examples. *The assertion that a single telephone or tele-*

graph wire or circuit may transmit messages in both directions simultaneously was not contradicted. (R. 803, 865-869)

Dr. Slepian studied at Harvard, in Germany, and in France; taught at Cornell; has been with the Westinghouse Electric & Manufacturing Company for over twenty-five years; and now holds the position of Associate Director of Research in that company. He has written books and many technical papers, has received prizes for such papers, and is a Fellow of many learned societies. He is also an inventor of distinction. For twenty-five years he has devoted himself chiefly to technical problems relating to generation, distribution and utilization of electric power. A detailed statement in regard to his education, experience, and achievements appear in R. 767–768.

Dr. Lewis is Director of the School of Electrical Engineering at Cornell University. He had been an engineer in the Westinghouse Electric & Manufacturing Company for ten years before joining the staff at Cornell, and during that time his duties consisted of investigations and studies in connection with the transmission of electric power. A fuller statement of his education and experience appears in R. 860–862.

Thus it is evident that both of these experts were men who had large experience of a practical, as well as of a theoretical, nature; and it is important to note that they had graduate training in the fundamental sciences, along lines of scientific rigor. On the other hand, the Commission witnesses, Miller and Thomas, have been engaged entirely in applications where questions of rigorous validity seldom arise.

It did not appear that Thomas had had any particular occasion to consider the possibility of simultaneous counterflow or, indeed, that he had ever considered it at all until called upon by the Federal Power Commission to do so for the purposes of investigations to establish the extent of Fed-

eral Power Commission jurisdiction. (R. 603–604, 625) He admitted that he had performed no experiments, and he offered no authority, other than his own assertions, either in his testimony when originally called or in his testimony when called in rebuttal, to disprove the statements of Slepian and Lewis that it is impossible to demonstrate that counter-flow does not take place. (See R. 604–607) He did admit that engineers often consider two currents as existing separately in an electrical conductor at certain times. (R. 593) He always qualified any such admission, however, by stating that this was not the physical fact (R. 593), although it seems perfectly clear from his testimony as well as from that of Slepian and Lewis that there is no physically verifiable means of determining whether this is or is not the fact. (R. 603–605)

We submit that the method used by the Commission engineers to trace energy from Massachusetts to the property of Petitioner is invalid and incapable of scientific proof.

The fundamental reason why this method is invalid is that it takes an assumption which is made in the industry for a strictly limited purpose, in which the validity of the assumption is not vital, and employs it as the factual basis for a conclusion completely foreign to the purpose for which the assumption was used in the industry. It assumes that the readings of watt-hour meters in lines running to and from the South Meadow bus indicate unique flows of energy. It further assumes that from such flows one can determine the source of energy utilized by a given load. Slepian and Lewis strongly censured the use of such assumptions for the purpose of determining the source of energy (R. 774, 782, 783, 873)

Numerous examples are cited in the testimony of Slepian and Lewis of concepts regularly used in electrical engineering in which the current is resolved into components; and these concepts lead, by the same method of relating energy

flow to current flow as used by Thomas (R. 596), to other dispositions of the energy flow. Yet all of these concepts, properly used, yield the same results in so far as any actual measurements are concerned. In many cases these concepts have measurable identity, that is, the component may be shown by a suitable meter. (R. 776–777; 865–870)

Thomas admitted that the conclusions which he expressed in support of Miller's diagrams were based upon circumstantial evidence. (R. 1007–1009) In scientific matters, however, the acceptance of conclusions based upon circumstantial evidence is certainly not valid unless the given set of circumstances leads to only one set of conclusions. But it is clear from the foregoing that in this case the same set of circumstances leads to alternative conclusions, no one of which can be proved by any sound scientific reasoning to be uniquely valid. The other conclusions must therefore be accorded equal weight until additional scientific evidence is discovered. (R. 782)

The discussion of this matter in the opinion of the Commission (R. 79–81) indicates that its conclusion as to this point is based upon several misapprehensions.

The opinion is misleading in stating (R. 81):

> "That Respondent's expert and other witnesses did not testify that the method of tracing the flow of electric energy used by the Commission's staff engineers was erroneous, is, under the circumstances, highly significant."

These experts did state that the hypothesis which the Commission's engineer used "is not made customarily in the operation of power systems", that the method of proof adopted "was not satisfactory", that they knew "of no established principle" with which it conformed, that it might lead to "ridiculous or at least non-uniquely determinable results", that it had no "scientific basis", and that for these

reasons it was "wrong" and "incorrect." (R. 774, 782, 828, 864, 873)

In the next paragraph (R. 81) the opinion states that the "views of Respondent's experts were limited to observing solely the mathematical equality, or lack of equality, of generation and load." It then alludes to answers to certain questions about a theoretical situation, with unconnected generators and loads in Shanghai, China, and Hartford, and concludes: "An expert's opinion which regards such an unreal postulate as equally valid with the conclusion that the respective loads are carried by the local generators, as shown by meters on the connecting electric circuits, appears to us wholly worthless for the practical purpose of administering the Federal Power Act."

This again gives an incorrect picture of the situation. The answers of Dr. Slepian, to which reference is made in this part of the opinion, were to questions of an entirely hypothetical nature, and it is clear from a complete reading of his testimony that he treated them as such and not as questions applying to any actual situation. Indeed, he pointed out the importance of connection and stated that the theoretical situation which was suggested was impossible. (R. 810–816)

The opinion also indicates that the Commission engineers were merely using the meter readings for the same purpose for which they are commonly used in the industry, and in doing so it evidently relies upon the testimony of Mayott, the manager of the Connecticut Valley Power Exchange. The inference which the Commission draws from his testimony is erroneous.

In daily practice watt-hour meters can be and are used to record the resultant flow of energy, but the energy components giving this resultant can be recorded only in special cases. Although it is possible to determine the direction of flow of the resultant energy from the meter reading, the

direction of any single component is thus not determined unless all other components and the resultants are known. (See R. 774)

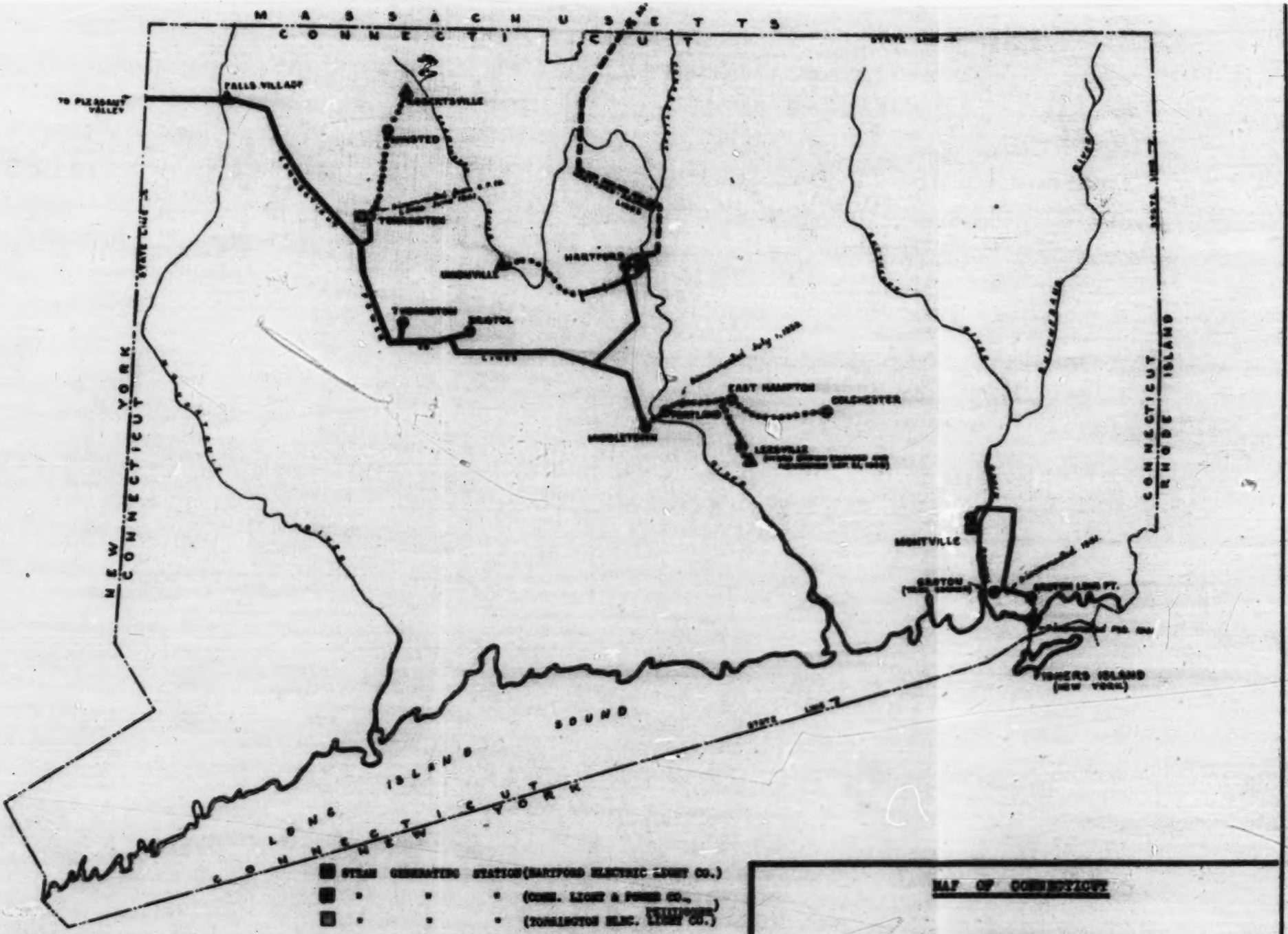
No witness other than the two Commission employees testified that watt-hour meters indicated anything other than the net flow of electric energy, because the energy which other witnesses referred to was the net energy, and not a particular component. It did not appear whether Mayott considered the possibility of counter-flow or how he computed the energy losses entailed in the transmission of energy over lines used to supply a particular load.

It is unthinkable that when Congress passed the Act in 1935, with the background of the committee reports and explanations which were given, it intended to give the Federal Power Commission jurisdiction over a utility on the basis of studies such as had never been made before, dependent upon doubtful theories which had never before been applied to such a situation, and supported only by the opinion evidence of the Commission's own employees.

When Congress in the Act referred to "interstate commerce", it could not have had in mind the establishment of interstate commerce by evidence of the character presented by the Commission engineers. To permit this is, as a practical matter, to give the Commission jurisdiction over all facilities for transmission connected as part of a system of transmission situated in more than one state. The legislative history indicates clearly that Congress deliberately decided not to do that.

In the bill as originally introduced in the Senate by Senator Wheeler (S. 1725, 74th Congress, First Session), Section 201(a) granted the Commission jurisdiction over the "production" of electric energy, over all facilities for its transmission and sale in interstate commerce, and "over all facilities connected therewith as part of a system of

power transmission situated in more than one state", with certain exceptions. After various changes, the House deleted the phrase "and over all facilities connected therewith as parts of a system of power transmission situated in more than one state", and in the bill as finally passed those words were omitted.


MASSACHUSETTS
CONNECTICUT
NEW YORK
RHODE ISLAND
LONG ISLAND SOUND
FALLS VILLAGE
TO PLEASANT VALLEY
HARTFORD
EAST HAMPTON
COLCHESTER
MIDDLETOWN
MONTVILLE
PIERCE ISLAND (NEW YORK)
STEAM GENERATING STATION (HARTFORD ELECTRIC LIGHT CO.)
(CONN. LIGHT & POWER CO., PETITIONER)
(TORRINGTON ELEC. LIGHT CO.)
HYDRO (CONN. POWER CO.)
(CONN. LIGHT & POWER CO., PETITIONER)
SUBSTATION (CONN. POWER CO.)
(CONN. LIGHT & POWER CO.)
(TORRINGTON ELEC. LIGHT CO.)
(MUNI. OF GROTON)
(CONN. LIGHT & POWER CO.
(MUNI. OF GROTON)
HARTFORD-MIDDLETOWN 66000 VOLT LINE (CONN. POWER CO.)
OTHER 66000 VOLT LINES (CONN. POWER CO.)
22000 VOLT LINE (CONN. LIGHT & POWER CO.)
LESS THAN 22000 VOLT (CONN. POWER CO.)
22000 VOLT (CONN. LIGHT & POWER CO.)
22000 VOLT (HARTFORD ELECTRIC LIGHT CO.)
22000 VOLT SUBMARINE CABLE (PIERCE ISLAND CO.)
22000 VOLT (MUNI. OF GROTON)

MAP OF CONNECTICUT

SHOWING

CONNECTIONS OF THE CONNECTICUT LIGHT AND POWER COMPANY WITH OTHER SYSTEMS INVOVED IN FINDINGS OF THE FEDERAL POWER COMMISSION, AS THE CONNECTIONS EXISTED FROM JANUARY 1, 1937 UNTIL DATES INDICATED THEREON.